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GOD AND STATE PREAMBLES

PETER J. SMITH* & ROBERT W. TUTTLE**

Those who question the permissibility of official acknowledgments of God might be surprised to learn that the preambles of forty-five of the fifty state constitutions expressly invoke God. The practice is common in both liberal and conservative states and is equally prevalent in all regions of the country. Virtually all of those preambles give thanks to God, and many also seek God's blessing on the state's endeavors. Yet there has been no detailed assessment of the preambles' history or significance. This paper seeks to remedy that gap.

The preambles complicate the claim that official acknowledgments of God are incompatible with our legal culture. But the history of their adoption also does not offer clear support for those who support a robust inter-relationship between religion and civil government. References to God in state preambles were outliers for the first half-century after the ratification of the federal Constitution and did not become common until the 1840s, when the effects of the Second Great Awakening – and its commitment to the idea that religion was the province of the community and the state – influenced the process of state constitution-making. Most of the preambles are thus the product of a movement that sought to create, rather than to continue or restore, a tradition of collective acknowledgment of God in state constitutions.

The complex history of the preambles reveals the difficulty of relying on them to assert any strong normative claims about the proper relationship between religion and civil government. On the one hand, the history of the preambles does not provide obvious support to those who treat the original meaning as dispositive today, because there is no unambiguous and unbroken tradition, dating to the framing, of a dominant practice of references to God in state preambles. On the other hand, those who accept the possibility of dynamic constitutional meaning cannot readily ignore the near-uniform practice of referring to God in the preambles. At the same time, the character and function of a constitutional preamble – to state the polity's aspirations and inspirations without creating any operative law – might be sufficiently distinctive to limit the preambles' relevance for other forms of official endorsement of religious messages.

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I.	INTRODUCTION	758
II.	THE PREAMBLES: AN OVERVIEW	761
III.	THE PREAMBLES: HISTORICAL DEVELOPMENT	767
	A. 1776-1789	769
	B. 1790-1840	781
	C. 1840-1860	790
	D. 1861-1877	807
	E. 1878-Present	821
IV.	THE PREAMBLES RECONSIDERED	823
V.	CONCLUSION	832

I. INTRODUCTION

Over the past decade, the Supreme Court's focus in Establishment Clause cases has shifted from disputes over government funding of religious institutions to controversies over official acknowledgments of God or particular religious messages. Those who question the permissibility of such acknowledgments might be surprised to learn that the preambles of forty-five of the fifty state constitutions expressly invoke God.

The practice is common in both liberal and conservative states and is equally prevalent in Northern, Southern, Midwestern, and Western states. Virtually all of those preambles give thanks to God. California's preamble is typical, providing: "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."¹ Many of them also seek God's blessing on the state's endeavors; New Jersey's preamble, for example, states:

We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution.²

Only five states have constitutions that do not refer to God in the preamble, and three of those have constitutions that simply do not have preambles.³ The preambles certainly complicate the claim that

1. CAL. CONST. pmb. l.

2. N.J. CONST. pmb. l.

3. The constitutions of New Hampshire, Vermont, and Virginia begin with a Declara-

official acknowledgments of God are incompatible with our legal culture.

Despite their prevalence and tension with common understandings about the separation of church and state, the preambles have received very little academic attention. The occasional academic references—and cites in Supreme Court opinions—have, not surprisingly, relied on the preambles as support for the view that the federal Constitution tolerates official acknowledgment of God.⁴ But there has been no de-

tion of Rights with no formal preamble. See N.H. CONST.; VT. CONST.; VA. CONST. Only Oregon and Tennessee have preambles that do not refer to God. See OR. CONST. pmbl. (“We the people of the State of Oregon to the end that Justice be established, order maintained, and liberty perpetuated, do ordain this Constitution.”);

We, the delegates and representatives of the people of the state of Tennessee, duly elected, and in convention assembled, in pursuance of said act of Assembly have ordained and established the following Constitution and form of government for this state, which we recommend to the people of Tennessee for their ratification.

TENN. CONST. pmbl.

4. See, e.g., Christopher Hammons, *State Constitutions, Religious Protection, and Federalism*, 7 U. ST. THOMAS J. L. & PUB. POL’Y 226, 230–31, 235 (2013) (arguing that invocations of God are “part of a long constitutional tradition in the United States” because “an astounding ninety percent mention God in their preamble,” and “indicate that religion, far from vanquished in American constitutionalism, is merely another aspect of our federal government intended for state jurisdiction”); E. Duncan Getchell, Jr. & Michael H. Brady, *How the Constitutions of the Thirty-Seven States in Effect When the Fourteenth Amendment Was Adopted Demonstrate that the Governmental Endorsement Test in Establishment Clause Jurisprudence is Contrary to American History and Tradition*, 17 TEX. REV. L. & POL. 125, 145 (2012) (relying on state preambles to support claim that governmental endorsement of religion is consistent with the Establishment Clause); John C. Eastman, *We Are a Religious People, Whose Institutions Presuppose a Supreme Being*, 5 NEXUS 13, 18–20 (2000) (reviewing the preambles of several states from the time of the ratification of the federal Constitution, the ratification of the Fourteenth Amendment, and later, and arguing that such historical evidence of “a long-established and universal tradition” demonstrates that official invocation of God is constitutionally permissible; concluding that “[t]hese and similar constitutional acknowledgements of God remain in place to this very day, in nearly every one of the fifty states. It is a strange interpretation indeed that prohibits the very public acknowledgement of God to which so many of the state constitutions give voice.”); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1838 (2014) (Thomas, J., concurring in part and concurring in the judgment) (“[O]f the 37 States in existence when the Fourteenth Amendment was ratified, 27 State Constitutions ‘contained an explicit reference to God in their preambles.’”) (quoting Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 12, 37 (2008)); *Holy Trinity Church v. United States*, 143 U.S. 457, 465, 468 (1892) (arguing that “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people,” which is evident in the fact that “[e]very constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community,” such as the

tailed assessment of the preambles' history or significance. This paper seeks to remedy that gap.

If proponents of a legally enforced separation between religion and civil government must confront the ubiquity of references to God in state preambles, supporters of robust inter-relationship between religion and civil government must concede that the preambles do not offer clear historical support for their view. Close consideration of the history of the preambles reveals that references to God were outliers for the first half-century after the ratification of the federal Constitution. In fact, they did not become common until the 1840s, when the effects of the Second Great Awakening⁵—with its commitment to the idea that God specially blessed America, and that the political community owes gratitude in response—influenced the process of state constitution-making.⁶ Most of the preambles are thus the product of a movement that sought to create, rather than to continue or restore, a tradition of collective acknowledgment of God in state constitutions.

The complex history of the preambles reveals the difficulty of relying on them to assert any strong normative claims about the proper relationship between religion and civil government. On the one hand, the history of the preambles does not provide obvious support to those who seek greater inter-relationship between religion and civil government and who treat the original meaning as dispositive today. Those sympathetic to this approach have measured constitutionality under the Establishment Clause by seeking to determine whether a particular practice “was accepted by the Framers and has withstood the critical scrutiny of time and political change.”⁷ But there is no “unambiguous and unbroken history of more than 200 years,” dating to the framing, of a dominant practice of references to God in state preambles.⁸

To be sure, many scholars and popular historians contend that the framers sought to create a government that embraced religion—and more specifically Protestant Christianity—and its influences on public life. But in making these assertions, they have often relied on the ar-

recognition in the preamble of the constitution of Illinois).

5. The Second Great Awakening was a Protestant revival movement that began in the late eighteenth century and focused on personal salvation and moral growth. It taught that the whole community, rather than just the individual, is the object of divine transformation. See *infra* at notes 121–38 and accompanying text.

6. See *infra* notes 139–43.

7. *Town of Greece*, 134 S. Ct. at 1819.

8. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

guments of those who wrote during the Second Great Awakening. There is a double irony in contemporary reliance on such claims. One of the projects of the Second Great Awakening was to re-imagine the framers of the federal Constitution as devout Christians who sought to create a holy community. This project, however, was ahistorical, based on a revisionist understanding of the framing era, as our discussion of the preambles will demonstrate. Similarly, modern efforts to invoke the state preambles as evidence of a longstanding tradition of official invocations of God are likely themselves to rely for historical support on the revisionism of the Second Great Awakening.

On the other hand, those who seek greater separation between religion and civil government and who accept the possibility of dynamic constitutional meaning cannot readily ignore the near-uniform practice of referring to God in the preambles. Indeed, if constitutional meaning can evolve based on changing practices and social values, then there is a plausible case that the Establishment Clause—or at least the Clause as incorporated against the states by the Fourteenth Amendment—tolerates some forms of official acknowledgment of God. To be sure, the character and function of a constitutional preamble—to state the polity’s aspirations and inspirations without creating any operative law—might be sufficiently distinctive to limit the preambles’ relevance for other forms of official endorsement of religious messages. But at a minimum, it would be implausible to argue that a reference to God in a state preamble that closely resembles those in other states violates the Establishment Clause today.

In Part II, we provide an overview of the preambles to the current state constitutions. In Part III, we explain the historical development of the preambles, with particular attention to the cultural and religious movements that led to their adoption. In Part IV, we consider what that history suggests about contemporary understandings of the relationship between church and state—and what it does not suggest.

II. THE PREAMBLES: AN OVERVIEW

Forty-five of the fifty current state constitutions refer to God. Those preambles vary in the terminology that they use to refer to God. The majority refer to “God”⁹ or “Almighty God,”¹⁰ but others refer to the

9. See, e.g., MINN. CONST. pmb. (“We, the people of the state of Minnesota, grateful to God for our civil and religious liberty . . .”).

10. See, e.g., IDAHO CONST. pmb. (“We, the people of the state of Idaho, grateful to Almighty God for our freedom . . .”).

“Supreme Ruler of the Universe,”¹¹ the “Sovereign Ruler of the Universe,”¹² the “Supreme Being,”¹³ the “great Legislator of the Universe,”¹⁴ or simply the “Divine.”¹⁵ They also vary in the claims, both explicit and implicit, that they make in invoking God. They range from the barely theological—such as Montana’s expression of gratitude “to God for the quiet beauty of our state, the grandeur of our mountains, [and] the vastness of our rolling plains”¹⁶—to the strikingly devotional—such as West Virginia’s explicit statement, adopted in 1960, “reaffirm[ing] our faith in and constant reliance upon God.”¹⁷

Constitutional preambles with references to God are not simply a phenomenon of states with politically conservative citizenries or states with large numbers of evangelical Christians. The preambles to the current constitutions of California, New York, and Massachusetts, for example, all refer to God.¹⁸ Indeed, New York’s has done so since 1777,¹⁹ Massachusetts’s since 1780, and California’s since its admission to the Union in 1849. There similarly is no predictable political or geographical pattern for the five states whose current constitutions do not mention God in a preamble; only New Hampshire, Oregon, Tennessee, Vermont, and Virginia either lack preambles in their current constitutions or do not refer to God in the preambles to their current constitu-

11. COLO. CONST. pmb. (“We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe . . .”).

12. WASH. CONST. pmb. (“We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties . . .”).

13. IOWA CONST. pmb. (“We the People of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed . . .”).

14. MASS. CONST. pmb. (“We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe . . .”).

15. Through Divine goodness, all people have by nature the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another . . .

DEL. CONST. pmb.; HAW. CONST. pmb. (“We, the people of Hawaii, grateful for Divine Guidance . . .”).

16. MONT. CONST. pmb.

17. W. VA. CONST. pmb.

18. See CAL. CONST. pmb.; MASS. CONST. pmb.; N.Y. CONST. pmb.

19. New York’s 1777 constitution, adopted upon the declaration of independence from Great Britain, simply quoted at length from the Declaration of Independence, which referred to “separate and equal station to which the laws of nature and of nature’s God entitle them.” N.Y. CONST. of 1777, pmb. The state’s 1821 constitution used different language with an explicit expression of gratitude to God. See N.Y. CONST. of 1821, pmb.

tions.²⁰

Although the preambles vary in many details, the language referring to God tends to fall into one of two basic verbal formulations. We refer to the two categories as “Type 1” and “Type 2” preambles. As we explain below, the categories likely reflected significant theological distinctions in the antebellum period. Over time, however, the significance of any state’s choice of one type rather than the other diminished, as states simply borrowed language from other states’ existing constitutions.

Type 1 preambles generally identify God or a supreme being as the source of rights or liberty and usually express gratitude to God for that liberty. They refer to blessings, if at all, as an attribute of liberty, and in that sense echo the Declaration of Independence and the federal Constitution. The only reference to the attributes of God in most Type 1 preambles is to God as creator, either of humankind, of liberty, of humankind’s capacity to enjoy liberty or engage in self-government, or some combination these things.²¹ However, Type 1 preambles make no claim about God’s sovereignty over human affairs or about American religious exceptionalism. North Dakota’s preamble, adopted in 1889 upon admission to the Union, is typical: “We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution.”²²

Many Type 2 preambles share with Type 1 preambles an expression of gratitude to God for liberty.²³ But what distinguishes them from Type 1 preambles is the additional assertion that the future welfare of the state depends (at least in part) upon God’s providence. The hallmark of Type 2 preambles is the possibility of future divine intervention in human affairs. Preambles of this type vary in the language that they use to indicate this relationship between God and the state:

20. See N.H. CONST. pmbl.; OR. CONST. pmbl.; TENN. CONST. pmbl.; VT. CONST. pmbl.; VA. CONST. pmbl.

21. Montana’s current preamble, which expresses gratitude to God for the natural bounty of the state, qualifies as a Type 1 preamble under our typology because it envisions God as creator with no other explicit claim of continuing divine involvement in human affairs.

22. N.D. CONST. pmbl.

23. Both Type 1 and Type 2 preambles often refer to God’s “blessings.” Whereas in Type 1 preambles the “blessing” has already occurred (in God’s creation of humankind with the capacity to enjoy liberty), in Type 2 preambles there is an additional contemplation of future blessings on human affairs.

some seek the “favor” or “guidance” of God;²⁴ some acknowledge “dependence” on God or God’s blessing;²⁵ and others express “reverence” for God.²⁶ But all seek God’s blessing on the people’s endeavors going forward. In asking God for a blessing, Type 2 preambles implicitly assert God’s sovereignty over human affairs.

Some Type 2 preambles also imply a claim about American exceptionalism: the idea, prominent during the Second Great Awakening, that God has entered a solemn compact with the American people, who were chosen as a symbol for the world of what religious freedom mixed with piety can accomplish. This claim is implicit in Type 2 preambles that invoke God’s “favor”²⁷ and in preambles that assert that God has “so long permitted” the people to enjoy liberty.²⁸ Iowa’s preamble, adopted in 1846, is a typical Type 2 preamble: “We the People of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government”²⁹

In the first hundred years of state constitution-making, the choice between Type 1 and Type 2 language often revealed something important about understandings, both theological and political, of the relationship between religion and secular authority. At least by the time that Reconstruction had ended, however, the choice was more likely to reflect the states’ tendency, when drafting their own constitutions, to borrow language from other states, often with little attention to whatever particular theological and political claims were originally implicit

24. See, e.g., ALA. CONST. pmb. (“We, the people of the State of Alabama . . . invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution”); GA. CONST. pmb. (“[W]e the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution.”).

25. See, e.g., IOWA CONST. pmb. (“We the People . . . grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain”).

26. See, e.g., MO. CONST. pmb. (1875) (“[W]ith profound reverence for the Supreme Ruler of the Universe, and grateful for his goodness”). Declarations of reverence adopt an attitude of worship, and expressions of gratitude for God’s “goodness” imply something crucial about God’s nature and an expectation of continued blessings from God.

27. See, e.g., ALA. CONST. pmb.

28. See, e.g., R.I. CONST. pmb. (“We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government.”).

29. IOWA CONST. pmb.

in the language.

The overwhelming majority of states currently have constitutions that include preambles that refer to God, but this has not always been the case. Indeed, references to God as the norm did not become an entrenched practice until at least the middle of the nineteenth century.

In the revolutionary era (1776–1789), only three of the eleven states that adopted constitutions included explicit references to God in their preambles. One of those (New York, in its 1777 constitution) simply included a quotation from the Declaration of Independence and its reference to the “Creator,” and another (Pennsylvania, in its 1776 constitution) removed the reference to God in a constitution adopted only a few years later.³⁰ Indeed, of the twenty-six states that formed the original union or joined the union before 1840, only six (including Pennsylvania) adopted constitutions with preambles referring to God between 1776 and 1840.³¹ This is notwithstanding the fact that, during this era, the twenty-four states collectively adopted thirty-nine new constitutions. Before 1840, in other words, references to God in preambles were the exception rather than the rule.

This changed in the 1840s, beginning with Rhode Island’s new (and first post-colonial-charter) constitution. Between 1840 and 1860, eighteen states adopted a total of twenty constitutions.³² Of those twenty, thirteen referred to God, including the original constitutions of five of the six states that joined the union during this era.³³ In this era, in other words, the majority approach was to refer to God in the preamble. Some of the states that adopted constitutions with preambles referring to God in this era, moreover, used “Type 2” language—that is, language that expressly contemplates a more direct involvement by God in human history.

In 1860, sixteen states (out of thirty-three) had references to God in the preambles to their constitutions.³⁴ On the eve of the Civil War, however, Texas was the only state that would join the Confederacy

30. See V.T. CONST. of 1777, pmb.; PA. CONST. of 1776, pmb.

31. See CONN. CONST. of 1818, pmb.; DEL. CONST. of 1792, pmb.; ME. CONST. of 1820, pmb.; MASS. CONST. of 1780, pmb.; N.Y. CONST. of 1777, pmb.; PA. CONST. of 1776, pmb.

32. Louisiana and Iowa adopted two constitutions each during this era. See IOWA CONST. of 1857; IOWA CONST. of 1846; LA CONST. of 1852; LA CONST. of 1845.

33. The states that adopted constitutions in this era that did not refer to God were Louisiana (twice), Florida, Michigan, Virginia, Kentucky, and Oregon.

34. The sixteen states did not include Pennsylvania, which dropped its reference to God in 1790 and did not add one again until 1874.

that had a reference to God in its preamble.³⁵ None of the other Southern states had adopted a reference to God in their constitutions.

The period between 1861 and 1876 was a time of great upheaval, and not surprisingly provided many occasions for constitution-making. Seven of the Confederate states adopted new constitutions upon secession (four – Virginia, North Carolina, Mississippi, and Tennessee – did not); several adopted constitutions at the end of the war; all eleven adopted new constitutions between 1868 and 1870; and three former Confederate states adopted new constitutions between 1873 and 1876. Even then, several of the secession and readmission constitutions did not include any references to God in the preambles. Those states did not add such references until they adopted new constitutions during or at the end of Reconstruction.

Between 1861, when the Civil War began, and 1876, when Reconstruction ended, nine of the eleven former Confederate states (all except Louisiana and Tennessee) adopted constitutions that referred to God in their preambles. (Louisiana adopted such a reference just a few years later, in 1879; Tennessee has never done so; and Virginia abandoned its reference to God when it adopted a new constitution in 1971.) In addition, five new states joined the union during this era, and four of them (all but West Virginia, which added a preamble with a reference to God in 1960) adopted references to God in their preambles.

In all, between 1861 and 1876, twenty different states collectively adopted forty-one constitutions. Twenty-seven of the forty-one constitutions mentioned God in the preamble, and sixteen of the twenty states adopted at least one constitution during this era that included a reference to God. No state that previously had adopted a constitution referring to God dropped such a reference during this era. By the end of Reconstruction, twenty-nine of the thirty-eight states had references to God in the preambles to their constitutions.

From the end of Reconstruction until the turn of the twentieth century, fifteen states (including seven new states joining the Union) adopted a total of sixteen constitutions. (Louisiana continued its prolific constitution-making by adopting two constitutions during this period.) All sixteen of these constitutions referred to God in their preambles; seven of those were western states adopting their original

35. TEX. CONST. of 1861, pmb1.

constitutions upon admission to the Union.³⁶

From 1900 to the present, twenty states adopted a total of twenty-six constitutions.³⁷ All but one referred to God. (Virginia, which referred to God for the first time in its 1902 constitution, omitted the preamble when it adopted its most recent constitution, in 1971.)

Taking a longer view, from the end of Reconstruction to the present, the states collectively adopted forty-three constitutions. Of those, all but one referred to God in the preamble. Although, as we explained above, the distinction between Type 1 and Type 2 preambles had largely lost significance by this point, we note that, of the forty-five states that currently have preambles with references to God, twenty-seven (or sixty percent) use Type 1 language, and eighteen (or forty percent) use Type 2 language. The more common approach, then, is to refer to God with an expression of gratitude, usually for liberty, but without a request for God's blessing.

In other words, references to God in state preambles were not typical in the framing era or in the early nineteenth century and did not become commonplace until at least a half-century after the ratification of the federal Constitution. At that point, however, references to God started to become the norm.

III. THE PREAMBLES: HISTORICAL DEVELOPMENT

As this brief overview makes clear, most references to God in state constitutions were adopted well after the founding era. Indeed, in 1840, fewer than one-fifth of the states had preambles that referred to God. In this Part, we consider in more detail the historical development of this trend, with particular attention to religious and theological movements and understandings that were influential in the late-eighteenth and nineteenth centuries.

As should be clear from the overview, the states collectively have adopted scores of constitutions, and they have amended their constitutions on thousands of occasions. For purposes of our study, we considered all state constitutions adopted in discrete constitution-making events—either by delegates in conventions, the legislature, or the people by referendum—from 1776, when the original thirteen colonies de-

36. See IDAHO CONST. of 1890, pmb.; MONT. CONST. of 1889, pmb.; N.D. CONST. of 1889, pmb.; S.D. CONST. of 1889, pmb.; UTAH CONST. of 1895, pmb.; WASH. CONST. of 1889, pmb.; WYO. CONST. of 1890, pmb.

37. During this period, Georgia and Louisiana adopted three constitutions each, and Michigan and Virginia adopted two each.

clared their independence, until the present. (The most recent such constitution-making event was in Rhode Island in 1986.) We did not treat individual amendments, however adopted, as discrete constitution-making events unless the amendments modified or added preambles, such as the amendment that West Virginia adopted in 1960.

Although we considered the constitutions that the original thirteen states adopted upon the assertion of independence but before the ratification of the federal Constitution, we did not treat as state constitutions the original thirteen states' older colonial charters, which were not adopted as acts of the people.³⁸ Although we do not view the colonial charters as state constitutions for the purpose of our study, we note that many of them referred to God, though there was considerable variation in their content and theological claims.³⁹ In addition, two states (Rhode Island and Connecticut) chose not to replace their colonial charters until several decades after independence and ratification of the federal Constitution. (Connecticut adopted its first post-independence constitution in 1818, and Rhode Island adopted its first in 1843.) Finally, some states that were territories before joining the union adopted territorial constitutions before admission. We considered those constitutions only to the extent that they became founding state constitutions.⁴⁰

38. We recognize, however, that some of those charters were perhaps closer to statements of the people than others. For example, Delaware's charter, issued by William Penn upon its separation from Pennsylvania, was promulgated by order of the Assembly. See CHARTER OF DELAWARE (1701), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 557-58 (Francis Newton Thorpe ed., 1909) [hereinafter 1 THE FEDERAL AND STATE CONSTITUTIONS].

39. There were several different types of colonial charters. Some were grants of authority from the King to exercise authority over lands in the new world; others were statements issued by colonial authorities with the essence of a foundational document. The charters' references to God, other than those made in passing (such as "God willing"), were typically used in the course of enumerating religious liberties, *see, e.g.*, CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3211-3222 (Francis Newton Thorpe ed., 1909) [hereinafter 5 THE FEDERAL AND STATE CONSTITUTIONS], or expressing an intent to Christianize the indigenous peoples of the colony, *see, e.g.*, CHARTER OF CONNECTICUT (1662), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 529-36. Some of the charters expressly established the Anglican Church as the official religion; *see, e.g.*, FUNDAMENTAL CONSTITUTIONS OF CAROLINA (1669), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2772-87.

40. Texas, for example, adopted a charter when it declared independence from Mexico, and that charter was the governing charter of the Republic of Texas until admission to the union. We did not consider that charter, however, but rather treated Texas's 1845 constitu-

A. 1776–1789

In late 1775, the Continental Congress responded to a query from New Hampshire about independence by obliquely recommending that the colony adopt a new constitution.⁴¹ New Hampshire, which declared independence in early 1776, adopted a constitution in January 1776.⁴² On May 10, 1776, the Congress recommended that all states “adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”⁴³ In response, seven other states adopted constitutions in 1776;⁴⁴ two states adopted constitutions in 1777;⁴⁵ and Massachusetts adopted a Constitution in 1780.⁴⁶ (Connecticut and Rhode Island did not adopt new constitutions until several decades later.)

Of the thirteen constitutions collectively adopted by eleven states between the beginning of the Revolutionary War and the ratification of the federal Constitution, only three included explicit references to God in their preambles.⁴⁷ One of the three (Pennsylvania) omitted that reference in a constitution adopted only a few years later.⁴⁸ The other

tion, adopted upon admission to the union, as its first constitution. We followed a similar approach for Utah, which had adopted a charter as the state of Deseret before its admission to the union, though the United States never recognized Deseret, as it had Texas, as an independent sovereign. *See* CONST. OF THE STATE OF DESERET of 1862.

41. 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 319 (Worthington Chauncey Ford ed., 1905) (recommending that the colonies “establish such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province, during the continuance of the present dispute between G[reat] Britain and the colonies”) (alteration in original).

42. *See* N.H. CONST. of 1776.

43. 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 342 (Worthington Chauncey Ford ed., 1906).

44. *See* DEL. CONST. of 1776; MD. CONST. of 1776; N.J. CONST. of 1776; N.C. CONST. of 1776; PA. CONST. of 1776; S.C. CONST. of 1776; VA. CONST. of 1776.

45. GA. CONST. of 1777; N.Y. CONST. of 1777.

46. MASS. CONST. of 1780.

47. New Hampshire and South Carolina each adopted two constitutions during this era; none of those four constitutions referred to God. *See* N.H. CONST. of 1784; N.H. CONST. of 1776; S.C. CONST. of 1778; S.C. CONST. of 1776. Although Georgia adopted a constitution in 1789, it did so after ratification of federal Constitution, in large part to come into conformity with that document.

48. Vermont, which hoped to form a separate state, adopted a charter in 1777 and another in 1786 that included preambles that referred to God. The neighboring states, however, did not recognize Vermont’s claim to statehood at that time, and Vermont did not become a state until 1791. When it achieved statehood, the state adopted a constitution in 1793 with no explicit reference to God in the preamble.

eight states adopted constitutions (including the two each that Georgia and South Carolina adopted) that did not include references to God in their preambles. In other words, ten of thirteen revolutionary-era state constitutions (and the constitutions of eight of eleven states that adopted constitutions in this era) did not invoke God or any other conception of the divine in their preambles. Most of those constitutions, particularly those adopted in 1776 and 1777, instead opened with a statement of grievances with the British Crown, as did the Declaration of Independence.⁴⁹ Although we turn now to the three states that did invoke God in their revolutionary-era preambles, we do not wish to obscure the fundamental point that most of the states in this era chose to adopt constitutions devoid of such references.

The three preambles adopted in this era that mention God reflect a range of views about the relationship between religion and the political community. There is a vast literature on religion in the Revolutionary Era, and more particularly on the influence of religious ideas on the Revolution and Founding.⁵⁰ It is impossible to provide a succinct summary of that literature, but nonetheless important to highlight several themes that bear directly on our thesis.

Among both elites and the general populace, there was a significant diversity of religious views. At the orthodox end of the spectrum, traditional Anglicanism persisted in the South,⁵¹ while in New England Congregationalism succeeded the rigid Calvinism of early Puritanism.⁵² At the other end of the spectrum, Unitarianism and Deism rejected traditional Christian understandings of God, particularly the

49. See, e.g., N.H. CONST. of 1776 (stating the purpose to “establish some form of government” after having “taken into our serious consideration the unhappy circumstances, into which this colony is involved by means of many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges”).

50. See, e.g., DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 196, 203–14 (2010); GREGG L. FRAZER, THE RELIGIOUS BELIEFS OF AMERICA’S FOUNDERS: REASON, REVELATION, AND REVOLUTION 1–13 (2012); FRANK LAMBERT, SEPARATION OF CHURCH AND STATE: FOUNDING PRINCIPLE OF RELIGIOUS LIBERTY 187–207 (2014); STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA ix–xvi, 3–4 (2008).

51. See JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 75–80 (2008) (discussing Anglicanism in Virginia); JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 121 (3d ed. 2011) (discussing the division of “Lutherans, Presbyterians, and other denominations into northern and southern branches”).

52. See HUTSON, *supra* note 51, at 79–82, 128; GEORGE MCKENNA, THE PURITAN ORIGINS OF AMERICAN PATRIOTISM 60 (2007); ERAN SHALEV, AMERICAN ZION: THE OLD TESTAMENT AS A POLITICAL TEXT FROM THE REVOLUTION TO THE CIVIL WAR 155–57 (2013).

divinity of Christ, the involvement of God in history, and the idea of eternal judgment.⁵³ Equally important, the middle of the spectrum reflected the influence of the First Great Awakening, which contrasted with orthodoxy in its revival of a religion of the heart rather than the head. This movement demanded of all believers an authentic individual experience of rebirth in the Spirit, in sharp contrast to the arid doctrinal preaching in many Anglican and Congregationalist churches.⁵⁴

This diversity of religious thought has practical implications for the era's understandings of the relationship between religion and civil government. In New England, the region dominated by Puritanism's successors, revolutionary-era governments reflected the idea of a close link between faith and political society, although only the Massachusetts constitution expressly incorporated this view in its preamble.⁵⁵ Outside of New England, however, the broad diversity of religious views ultimately converged on the understanding that religion is an essentially individual matter.⁵⁶ This does not mean that the prevailing view in this era denied all relationship between God and the political community, but outside of New England, the crucial relationships were between the individual and God and the individual and the political community, rather than any direct relationship between God and civil government.

The three states in this era that adopted constitutions with preambles referring to God reflect this diversity of religious views. Indeed, New York's preamble contains within its language the full range of views in this era. The preamble simply quoted, verbatim, from the Declaration of Independence, including its reference to "the laws of nature and of nature's God" and its assertion that "all men . . . are endowed by their Creator with certain unalienable rights."⁵⁷ On the one hand, the preamble (unlike most other preambles of the era) proclaims

53. See DRAKEMAN, *supra* note 50, at 51.

54. See HUTSON, *supra* note 51, at 76.

55. See *infra* notes 69–81 and accompanying text.

56. See HUTSON, *supra* note 51, at 129–31. *But see id.* at 132–34 (noting continuing forms of state involvement with religion).

57. When, in the course of human events, it becomes necessary for one people . . . to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them . . . We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights[.]

N.Y. CONST. of 1777, pmb1.

the existence of God and expressly declares God to be the source of liberty. In this respect, the preamble reflects the influence of Congregationalist New England, which emphasized public recognition of the divine.⁵⁸ On the other hand, the preamble, in its focus on individual natural rights, highlights only God's relationship with the individual, rather than any direct relationship between God and the political community, and God's role as creator. In this sense, the language was also consistent with the Unitarian and Deist traditions, as well as the core traditions of the First Great Awakening. In addition, the preamble makes no express claim about God's continuing sovereignty over human affairs.⁵⁹ For this reason, although it did not express gratitude to God for liberty, New York's 1777 preamble was the earliest Type 1 preamble.

The preamble to Pennsylvania's 1776 constitution also referred to God, but its language and implicit claims reflect different strands of revolutionary-era religious thought. It opened by declaring that its purpose was to enable individuals "to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man[.]"⁶⁰ It then stated that the delegates "confess[] the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government) in permitting the people of this State . . . deliberately to form for themselves such just rules as they shall think best . . ."⁶¹

Notwithstanding the Quaker tradition in Pennsylvania, the language of the preamble reflects an orthodox Calvinism that is closely related to New England Congregationalism.⁶² To be sure, the "Author of existence" formulation, in describing a God who creates the natural order but may not play any continuing role in directing human affairs, is similar to the idea of God reflected in the 1777 New York preamble.⁶³ But the collective confession of belief in the goodness of the "great

58. See WITTE & NICHOLS, *supra* note 51, at 118.

59. By identifying God as the source of natural law and rights, the preamble (and the Declaration) emphasizes the role of divine authorship, but not divine involvement in history; God creates the order, which is fundamentally normative, but leaves human action free within that construct. On this view, God creates man with the capacity to exercise reason and construct rational, free systems of government. But God's involvement in the direction of human affairs, and in particular political affairs, ends with the act of creation.

60. PA. CONST. of 1776, pmb1.

61. *Id.*

62. See HUTSON, *supra* note 51, at 95-98.

63. N.Y. Const. of 1777, pmb1.

Governor of the universe” distinguishes Pennsylvania’s preamble from New York’s in important ways.⁶⁴ First, the Pennsylvania preamble purports to assert a collective belief in the goodness of God. Second, it asserts a claim about God’s omniscience in declaring that God “alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government.”⁶⁵ These claims go well beyond the individualist understanding suggested by New York’s preamble, and instead proclaim a communal relationship with God. Together, these assertions make Pennsylvania’s 1776 preamble more like the Type 2 preambles that would become common in the middle of the nineteenth century than the Type 1 preambles, which merely expressed gratitude to God as the source of liberty.⁶⁶

64. The closing provision of the Articles of Confederation, adopted two years later, echoes the religious language in Pennsylvania’s preamble. See ARTICLES OF CONFEDERATION of 1777, art. XIII (“And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union.”).

65. PA. CONST. of 1776, pmb1.

66. Unlike the Type 2 preambles that would become more common seventy years later, however, Pennsylvania’s 1776 preamble did not appear to contemplate a God who was directly engaged in human history. Although the God contemplated in the preamble “alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government,” that God leaves the worldly task of self-government to mankind—who can “deliberately . . . form for themselves such just rules as they shall think best”—and thus does not foreordain the success or failure of that enterprise.

The preambles to Vermont’s 1777 and 1786 pre-statehood constitutions were very similar to Pennsylvania’s 1776 preamble.

Whereas, all government ought to be instituted and supported . . . to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man

We the representatives of the freemen of Vermont . . . met, for the express purpose of forming such a government, confessing the goodness of the Great Governor of the universe, (who alone, knows to what degree of earthly happiness, mankind may attain, by perfecting the arts of government,) in permitting the people of this State, by common consent, and without violence, deliberately to form for themselves, such just rules as they shall think best for governing their future society; . . . [do] ordain

See VT. CONST. of 1777, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3737–39 (Francis Newton Thorpe ed., 1909) [hereinafter 6 THE FEDERAL AND STATE CONSTITUTIONS]; VT. CONST. (1786), *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3749–51 (Francis Newton Thorpe ed., 1909) (same) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS]. Ethan Allen played a role in drafting Vermont’s secession constitutions; a

Although the preamble envisions a robust understanding of God's role in the political community, Pennsylvania's 1776 constitution did not otherwise contemplate or enforce a direct relationship between religion and the state.⁶⁷ In contrast, Massachusetts, the other state that referred to God in the preamble to its revolutionary-era constitution, had a longer and more entrenched tradition of state support for and enforcement of religion than any of the other original thirteen states,⁶⁸ a fact that pervades its 1780 constitution.

Massachusetts's 1780 constitution established a state church⁶⁹ and asserted that it is the "duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe."⁷⁰ Although Massachusetts was not alone among the states in this era in its establishment of a state church, its constitution was unusual in the degree to which it appeared to contemplate a relationship between the state and religion.

Consistent with this approach, Massachusetts's preamble provides:

We, . . . the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity . . . of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish, the following . . . as the Constitution of the Commonwealth of

few years later, he wrote a treatise that is infused with Deist thought. *See generally* ETHAN ALLEN, REASON, THE ONLY ORACLE OF MAN; OR, A COMPENDIOUS SYSTEM OF NATURAL RELIGION (1836). Vermont claims to statehood were not successful until fifteen years later, and the state's constitution adopted upon admission to the union did not refer to God.

67. PA. CONST. of 1776.

68. At the beginning of the Revolutionary War, nine of the colonies either had an established church or provided direct aid to churches. (Only Rhode Island, New Jersey, Delaware, and Pennsylvania did not have established churches and did not provide direct aid to churches.) There were not established churches or aid to churches in most of New York, either, though four counties near New York City had established churches. By 1791, however, when the Bill of Rights was ratified, all but three of those states had effectively ended their establishments or direct support for churches. (Connecticut disestablished its state church in 1818, New Hampshire in 1819, and Massachusetts in 1833.) *See* STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH CENTURY AMERICA 119-45 (2010) [hereinafter GREEN, THE SECOND DISESTABLISHMENT]. Massachusetts thus quickly became the exception in its establishment of religion.

69. MASS. CONST. of 1780, art. III (providing for funding for Christian congregations to promote the moral development of the citizenry).

70. *See id.* art. II.

Massachusetts.⁷¹

In contrast to Pennsylvania's 1776 preamble and New York's 1777 preamble, the 1780 Massachusetts preamble contemplates a God who is deeply engaged in human history.⁷² This conception is apparent both in the idea of divine providence and sufferance, invoked in the first half of preamble, and in the explicit petition for future guidance in the second half of the preamble. Because of its conception of an historically engaged God, the Massachusetts preamble is the clearest early example of a Type 2 preamble.

Notwithstanding the pervasive recognition of God and religion, the Massachusetts constitution does not reflect an official effort to advance religion for the purpose of saving souls. Instead, the provisions described above reveal a more instrumental view of religion.

The animating principle of the 1780 constitution is civic republicanism: the view that a healthy political order depends on the morality of the citizenry and the community as a whole, and that the government has an affirmative obligation to shape and maintain that moral identity.⁷³ Religion played a key role in this political order because, as Theophilus Parsons, the principal author of the 1780 constitution and later a judge on the Massachusetts Supreme Court, explained,

the duties of charity and hospitality, benevolence and good neighborhood . . . are moral duties, flowing from the disposition of the heart, and not subject to the controul of human legislation. Neither can the laws prevent, by temporal punishment, secret offences, committed without witness, to gratify malice, revenge, or any other passion, by assailing the most important and most estimable rights of others.⁷⁴

Civic republicanism thus proceeds on the assumption that mere temporal law is inadequate to ensure moral, civic-minded behavior.⁷⁵ This understanding of civil order perfected by religious duty depends

71. *Id.* pmb1.

72. *Id.*

73. See WITTE & NICHOLS, *supra* note 51, at 33–36.

74. *Barnes v. First Parish of Falmouth*, 6 Mass. 401, 405 (1810). *Barnes* involved a claim by a Universalist teacher for payment from public funds for his religious instruction. *Id.* at 404.

75. See *id.* at 405–06 (“Civil government therefore, availing itself only of its own powers, is extremely defective; and unless it could derive assistance from some superiour [sic] power, whose laws extend to the temper and disposition of the human heart, and before whom no offence is secret; wretched indeed would be the state of man under a civil constitution of any form.”).

upon a God who is engaged in history, and in particular who attends to human sin and merit in order to dispense eternal punishment and reward. Civic republicanism assumes that when members of society long for such rewards in the afterlife, or fear eternal punishment, they are more likely to act in a civic-minded and righteous manner.

The civic republican vision of the relationship between civil and religious obligations is particularly apparent in Article III of the constitution's Declaration of Rights, which provides for state funding of Protestant congregations. The provision explicitly states that the support it authorizes—"for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality"—is designed to "promote [the people's] happiness, and to secure the good order and preservation of their government."⁷⁶ It also notes that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality," which "cannot be generally diffused through a community but by the institution of the public worship of God, and of the public instructions in piety, religion, and morality."⁷⁷

Article III thus highlights two related ideas that mark its civic republican lineage. First, the provision emphasizes the importance of religion for a healthy civic order. Government support for religion is not for the purpose of saving souls, but rather is designed to secure "good order and preservation of civil government."⁷⁸ Second, and related, it does not specify any particular denomination of Protestantism as deserving of or entitled to public support. The political function of religion is served, on this view, by elements common to a wide range of Protestant traditions, specifically the belief in a system of divinely ordained moral duties, the existence of an afterlife, and a God who judges and punishes transgressors in that afterlife. Article III thus justifies public financial support for religion in purely instrumental and secular terms: government support for religion is necessary for a peaceful and law-abiding society.⁷⁹

76. MASS. CONST. of 1780, art. III.

77. *Id.* Cf. NORTHWEST ORDINANCE art. III (1787) (promoting education by stating "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

78. MASS. CONST. of 1780, art. III.

79. *Barnes*, 6 Mass. at 406 ("[T]he people of Massachusetts, in the frame of their government, adopted and patronized a religion, which, by its benign and energetic[] influences, might co-operate with human institutions, to promote and secure the happiness of the citizens, so far as might be consistent with the imperfections of man.").

This instrumental conception of religion's role in politics also informs the provision requiring office holders to declare the following oath: "I believe the Christian religion, and have a firm persuasion of its truth."⁸⁰ Viewed in light of the other provisions of the Massachusetts constitution, the oath requirement does not reveal a view that the government is, or ought to be, itself a holy community, with the glorification of God as its aim. Instead, it reflects the civic republican view that morality depends on religion, and in particular the belief that God would punish in the afterlife those who committed transgressions in this life, and that temporal law, by itself, cannot generate or sustain a citizenry capable of democratic republican government.⁸¹ On this view, an office holder's personal belief in the possibility of eternal punishment is an important guarantor of public rectitude.

This view apparently was widely shared in the revolutionary era. Although only three of the states adopted constitutions in the revolutionary era that included preambles mentioning God, eight included provisions requiring office holders either to declare an oath stating a belief in the Christian faith⁸² or to be adherents of a Protestant faith.⁸³ The particular oaths required of office holders often revealed, as did the provisions of the Massachusetts constitution, an instrumental view of the role of religion in political life. For example, although Pennsylvania's 1776 constitution required members of the legislature to declare an oath more specific, in its religious content, than that of Massachusetts—by requiring an acknowledgement that "the Scriptures of the Old and New Testament [were] given by Divine inspiration"⁸⁴—its terms identified a secular justification for requiring adherence to Christianity. By requiring a belief in a God who is "the rewarder of

80. MASS. CONST. of 1780, ch. VI, art. I.

81. See, e.g., HUTSON, *supra* note 51, at 119, 139 (linking language in oath clauses to John Adams's view that religion is a necessary means of achieving republican government, not an end of itself, because without a guarantee of adherence to conscience officials might be tempted to subordinate the public will to personal benefit).

82. DEL. CONST. of 1776, art. XXII; MD. CONST. of 1776, art. XXXV; MASS. CONST. of 1780, ch. VI, art. I; PA. CONST. of 1776, § 10. Vermont also included such a provision in its 1777 constitution, see VT. CONST. of 1777, ch. II, § IX, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 3743, but it did not become a separate state until 1791, and its 1793 constitution did not include such a requirement, see CHESTER J. ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 102–04 (1965).

83. GA. CONST. of 1777, art. VI; N.H. CONST. of 1784, arts. XXIX, XIV; N.J. CONST. of 1776, art. XIX; N.C. CONST. of 1776, art. XXXII. Although South Carolina's 1778 constitution limited eligibility for office to Protestants, see S.C. CONST. of 1778, §§ III, XII, XIII, its 1776 constitution did not include such a provision.

84. PA. CONST. of 1776, § 10.

the good and the punisher of the wicked,"⁸⁵ the oath requirement's aspiration was to provide an incentive for civic-minded behavior by elected officials beyond the prospect of mere temporal punishment.

The oath clauses thus were consistent with the view that the aim of civil government is secular and that civil government exists to pursue earthly ends, including the maintenance of public order and the preservation of civil liberty.⁸⁶ Indeed, the relationship between religion and politics that the oath clauses contemplated came not through a confession of the state, but rather through the religious beliefs of individual office holders. These oath clauses thus did not reflect a practice of states claiming for themselves a religious identity.

In any event, the oath clauses and religious requirements for office did not endure for long. In 1789, the federal Constitution prohibited religious tests for federal office,⁸⁷ and that approach trickled down to the states. In the years that followed, not only did most new admissions to the union refrain from imposing religious tests,⁸⁸ but several of the states that had previously imposed religious requirements for office or required oaths declaring particular religious beliefs amended those provisions to eliminate the oath requirements and expressly prohibit religious tests, or adopted new constitutions that did so.⁸⁹ By

85. *Id.*

86. Indeed, the oath clauses and religious requirements for office often co-existed with separate provisions barring members of the clergy from eligibility for civil office. See DEL. CONST. of 1776, art. XXIX; GA. CONST. of 1777, art. LXII; MD. CONST. of 1776, art. XXXVII; N.C. CONST. of 1776, art. XXXI; S.C. CONST. of 1778, art. XXI. These provisions conventionally were justified on the ground that, as the 1777 New York constitution explained, "ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function." N.Y. CONST. of 1777, § XXXIX. Perhaps more important, the oath clauses and religious requirements co-existed (even if not perfectly harmoniously) with provisions guaranteeing the free exercise of religion. Indeed, the state constitutions adopted between independence and the ratification of the federal Constitution generally contained protection for the free exercise of religion, even if the states did not always respect that guarantee in practice. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1457-540 (2004).

87. U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

88. Vermont's original constitution, adopted in 1793, required only a secular oath of office, see VT. CONST. of 1793, ch. II, §§ 12, 29, reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 3767, 3769, and declared all persons who have resided in the state for two years eligible to hold public office, *id.* § 39, reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 66, at 3770. Kentucky's original constitution, adopted in 1792, did not specifically ban religious tests for office, but it also did not impose any such tests or oath requirements. See ANTIEAU, ET AL., *supra* note 82, at 103.

89. See DEL. CONST. of 1792, art. I, § 2 (eliminating oath requirement and expressly

1860, more than half of the then-admitted states had express prohibitions in their constitutions on religious tests for office.⁹⁰ Other states eliminated their religious tests or religious oath requirements shortly after the Civil War.⁹¹ Only a few declined to abandon them, leading to the Supreme Court's decision, in the second half of the twentieth century, that such requirements violate the Free Exercise Clause, as incorporated by the Fourteenth Amendment.⁹²

Eight of the eleven states that adopted constitutions during the revolutionary era chose preambles that did not refer to God. Similarly, the preamble to the federal Constitution, like the rest of the document,

prohibiting religious tests for office); GA. CONST. of 1789, art. I, § 15; *id.* art. II, § 5 (eliminating requirement that office holders be Protestant and requiring only a secular oath of office); MASS. CONST. of 1780, amend., arts. VI, VII (eliminating religious components of oath for office holders and requiring only a secular oath). South Carolina eliminated the requirement that office holders be Protestant in its 1790 constitution by requiring only a secular oath of office, *see* S.C. CONST. of 1790, art. IV, though it continued to ban clergy from public office, *see id.* art. I, § 23. In 1868, however, South Carolina adopted a new constitution that included a provision that disqualified from office those who deny the existence of a supreme being. S.C. CONST. of 1868, art. XIV, § 6. The current South Carolina constitution retains this (unenforceable) provision. *See* S.C. CONST. art. XVII, § 4 ("No person who denies the existence of a Supreme Being shall hold any office under this Constitution."). New Jersey did not adopt a new constitution until 1844, but when it did it eliminated the religious component of the oath of office, requiring only a secular oath. *See* N.J. CONST. of 1844, § VIII. Similarly, Rhode Island, which relied on its colonial charter instead of adopting a constitution during the founding period, expressly prohibited religious tests or disqualification from office on account of religious beliefs when it adopted its first state constitution in 1843. *See* R.I. CONST. of 1843, art. I, § 3.

90. *See* ANTIEAU ET AL., *supra* note 82, at 103.

91. New Hampshire eliminated the provision requiring office holders to be Protestant when it adopted a new constitution in 1877. *See* N.H. CONST. of 1877, amends. to the Const. of 1792 pt. II, § 29.

92. When Tennessee joined the union in 1796, its original constitution contained a clause excluding from office any person "who denies the being of god, or a future state of rewards and punishments." TENN. CONST. of 1796, art. VIII, § 2. When the state adopted a new constitution in 1835, it banned religious tests for office, *see* TENN. CONST. of 1835, art. I, § 4, but paradoxically maintained the disqualification from office for persons "who den[y] the being of God or a future state of rewards and punishments," TENN. CONST. of 1835, art. IX. Four other states—North Carolina, Pennsylvania, South Carolina, and Texas—adopted similar provisions. *See* N.C. CONST. of 1868, art., VI, § 5; PA. CONST. of 1874, art. I, § 4; PA. CONST. of 1790, art. IX, § 4; S.C. CONST. of 1868, art. XIV, § 6; TEX. CONST. of 1876, art. I, § 4. The net effect of these provisions was to impose a religious test for office without expressly requiring office holders to swear an oath with any particular religious content. These provisions—along with the few remaining provisions requiring office holders to believe in God or to declare such a belief, *see, e.g.,* MD. CONST. of 1867, art. 37—persisted until 1961, when the Supreme Court invalidated them in *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961). The Supreme Court later invalidated state constitutional provisions excluding clergy from eligibility for office. *See* *McDaniel v. Paty*, 435 U.S. 618, 629 (1978).

makes no reference to God.⁹³ Indeed, the convention does not seem even to have considered any proposal that included a reference to God in the preamble.⁹⁴ Some of the language in the preamble that the convention ultimately adopted derives from the resolution that Edmund Randolph offered in proposing the Virginia Plan,⁹⁵ and the Committee on Style drafted the rest of it. The only meaningful debate over the language of the preamble was over whether to attribute the act of constitution-making to the people of the several states, or instead to the people of the United States.⁹⁶ The Committee's proposed preamble—which declared the Constitution an act of “We the People of the United States”—“passed without debate.”⁹⁷ The delegates' adoption of a pre-

93. We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

94. Even the preamble to Charles Pinckney's proposed New Jersey Plan, which the Convention essentially rejected, did not refer to God. See Outline of the Plan, The Plan of Charles Pinckney (South Carolina), Presented to the Federal Convention (1787), http://avalon.law.yale.edu/18th_century/pinckney.asp [<https://perma.cc/5V85-L3YF>]. During the ratification debates in Connecticut, William Williams urged the adoption of a new preamble that would have stated,

We the people of the United States, in a firm belief of the being and perfections of the one living and true God . . . He will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in a dependence on His blessing and acknowledgment of His efficient protection

William Williams, Letter to the Printer, AM. MERCURY (Feb. 11, 1788), reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 589 (Merrill Jensen et al. eds., 1978). This proposal obviously was unsuccessful.

95. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., 1937) [hereinafter 1 THE RECORDS OF THE FEDERAL CONVENTION] (“Resolved that the articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely “common defence, security of liberty and general welfare.”).

96. The Committee on Style's first draft of the preamble referred to the people of the various states, which it listed, rather than the people of the United States. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 565, 651 (Max Farrand ed., 1937) [hereinafter 2 THE RECORDS OF THE FEDERAL CONVENTION]. Even this was a change from the convention followed in earlier foundational documents, which did not use the word “people” but instead used the term the “United States” as a plural noun or simply listed the states in geographical order. See, e.g., Treaty of Alliance with France, Fr.-U.S., Feb. 6, 1778; ARTICLES OF CONFEDERATION OF 1777; Treaty of Paris, Gr. Brit.-U.S., art. I, Sept. 3, 1783.

97. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 96, at 209, 651. The papers of various delegates to the Convention confirm that the convention did not even con-

amble that does not refer to God—and the lack even of any suggestion that it ought to refer God—is consistent with their sound rejection, two months after the Convention began, of Benjamin Franklin’s motion to begin each session with prayer led by a member of the clergy.⁹⁸

At the time of the ratification of the federal Constitution, in other words, only three of thirteen original states had adopted constitutions in the revolutionary era that invoked God in the preamble. Even that number overstates the frequency of the practice, as one of the three merely quoted from the Declaration of Independence, and another would abandon the reference only a few years later. The dominant approach, instead, was to eschew reference to God in the people’s declaration of the ends of state government. Massachusetts’s explicit and direct treatment of religion and religious obligation in its constitution quickly became anomalous among state constitutions, as the other states began to adopt constitutions that expressly barred state establishments of religion—and that declined to refer to God in the preamble.

B. 1790–1840

Between 1790, right after the ratification of the federal Constitution, and 1840, twenty states collectively adopted twenty-five constitutions. Only four contained preambles that mentioned God, and one of the states that had previously referred to God removed the reference when it adopted a new constitution.⁹⁹ During this period, thirteen new states

sider referring to God in the preamble. See *id.* at 137–38 (papers of George Mason) (stating that the “object of our preamble ought to be briefly to [] declare, that the present foederal [sic] government is insufficient to the general happiness, that the conviction of this fact gave birth to this convention; and that the only effectual (means) (mode) which they (could) (can) devise, for curing this insufficiency, is the establishment of a supreme legislative executive and judiciary”); *id.* at 150, 152, 163 (notes of James Wilson) (focusing on how to style the nation governed by the Constitution and whether to list the states individually in the preamble).

98. 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 95, at 452. Concerned about the delegates’ lack of progress, Franklin proposed “humbly applying to the Father of lights to illuminate our understandings” and moved that “henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.” *Id.* at 451–52. After Alexander Hamilton and others objected (because of financial limitations or the message that such a measure might convey about their prospect for success), the Convention adjourned without a vote on the motion. James Madison’s notes state that “[t]he Convention, except three or four persons, thought Prayers unnecessary.” *Id.* at 452 n.15.

99. See PA. CONST. of 1790, pmb. (“We, the people of the Commonwealth of Pennsylvania ordain and establish this Constitution for its government.”).

joined the union, and only one of those adopted a constitution that mentioned God in the preamble. Some of the states simply did not include a preamble to their constitutions.¹⁰⁰ The majority, however, included a preamble with a statement of purposes but no reference to God. A typical preamble from this era is the one that Kentucky adopted in 1792, upon admission to the union: "We, the representatives of the people of the State of Kentucky, in convention assembled, do ordain and establish this constitution for its government."¹⁰¹

In the first decade after the ratification of the federal Constitution, Pennsylvania dropped its prior reference to God, making it the only state to have included a reference to God in its original constitution and then omitted it in a subsequent state constitution.¹⁰² The records of Pennsylvania's convention show no controversy over the change from the detailed 1776 preamble that mentioned God to a brief and utilitarian preamble stating simply, "We, the people of the Commonwealth of Pennsylvania ordain and establish this constitution for its government."¹⁰³

100. See, e.g., MISS. CONST. of 1832.

101. KY. CONST. of 1792, pmbl. Some former territories also used the preamble to state the transition from territory to state, often by identifying the state's boundaries or the congressional legislation approving admission. The norm in such cases was not to refer to God. For example:

We, the people of the eastern division of the territory of the United States northwest of the river Ohio . . . consistent with the Constitution of the United States, the [Northwest Ordinance], and the law of Congress entitled "An act to enable the people of the eastern division of the territory of the United States northwest of the river Ohio to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes," . . . do ordain and establish the following constitution . . . and do mutually agree with each other to form ourselves into a free and independent State by the name of the State of Ohio.

OHIO CONST. of 1803, pmbl.

102. See *infra* notes 290-312 and accompanying text. The omission, however, was not permanent. Pennsylvania added a reference to God in the preamble to its 1874 constitution. In addition, although Virginia's original constitution did not have a preamble (and thus did not refer to God in a preamble), its 1870 and 1902 constitutions began with preambles that referred to God. But the state omitted the preamble (and the reference to God) in its 1971 constitution.

103. See PA. CONST. of 1790, pmbl. In contrast, there was considerable controversy over a provision in the enumeration of rights that prohibited disqualification from public office "on account of [] religious sentiments," but only for potential office holders who "acknowledge[] the being of a God, and a future state of rewards and punishments." PA. CONST. of 1790, art. IX, § 4; see THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT

Two years after Pennsylvania dropped its preamble's reference to God, Delaware added one in its new constitution, although the reference is oblique. The preamble to Delaware's 1792 constitution, which remains the state's preamble today, identifies "divine goodness" as the source of the rights that "all [people] have, by nature," as a way of describing the ultimate authority of the people to adopt a new constitution.¹⁰⁴ As such, the clause reflects an essentially Deist understanding of the divine and the relationship between the divine and humanity. On this view, the primary work of the divine was the creation itself, including the creation of human nature, with its rights and rational capacity. Because the only reference to the attributes of God in the 1792 Delaware preamble was to God as creator and the source of rights, with no express contemplation of ongoing divine involvement in human affairs,¹⁰⁵ the preamble is an early version, like New York's 1777 preamble, of a Type 1 preamble.

Delaware was the only one of the seven states that adopted new constitutions in the decade after the ratification of the federal Constitution to include a reference to God in its preamble. Georgia and South Carolina, which did not include references to God in the preambles of their original constitutions, continued to omit any reference in their new constitutions. The three new admissions to the union—Kentucky, Vermont, and Tennessee—also adopted constitutions with preambles that did not mention God. It is particularly notable that Vermont's constitution did not mention God, because both of its earlier charters, adopted when the state considered itself an independent republic and before its admission to the union, did.¹⁰⁶ The adoption of the federal constitution, with its entirely secular preamble, presumably influenced the drafting of preambles in this era.

Constitutions with preambles referring to God remained the exception for the first four decades of the nineteenth century, as well. After Delaware's 1792 constitution, it was twenty-six years before another state constitution mentioned God in the preamble. During those two

CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTION OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTIONS OF 1776, AND THE COUNCIL OF CENSORS, 195–96, 217–19, 376–77 (1825). The 1790 Pennsylvania constitution also eliminated the previous constitution's religious test for public office, instead requiring only a secular oath for office holders. PA. CONST. OF 1790, art. VIII (1790).

104. DEL. CONST. OF 1792, pmbl.

105. *Id.*

106. See *supra* note 66 and accompanying text.

and a half decades, eight states adopted nine constitutions;¹⁰⁷ seven of the eight states were new admissions to the union.

Indeed, between 1800 and 1840, sixteen states, including ten new admissions to the union, collectively adopted seventeen new constitutions,¹⁰⁸ and only three of them included references to God in the preamble. One of those—Maine’s, in 1820—essentially borrowed the language of Massachusetts’s constitution¹⁰⁹ when it split off from the latter to form a separate state. The land that became the state of Maine had previously been a part of Massachusetts, but Maine obtained separate statehood as part of the Missouri Compromise of 1820, to ensure that northern representation in Congress was not diminished by the admission of Missouri as a slave state. It thus is not surprising that Maine’s constitution borrowed substantially from Massachusetts’s. Maine’s preamble, like Massachusetts’s, “acknowledg[es]” the goodness of God and “implor[es] his aid and direction,”¹¹⁰ and thus is an early version of a Type 2 preamble.

The other two states to adopt constitutions with preambles referring to God between 1800 and 1840 were Connecticut and New York. The preamble of the 1818 Connecticut constitution provides,

The people of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government, do, in order more effectually to define, secure, and perpetuate the liberties, rights, and privileges which they have derived from their ancestors, hereby, after a careful consideration and revision, ordain and establish the following constitution and form of civil government.¹¹¹

New York’s 1821 constitution used very similar language in its preamble: “We, the people . . . acknowledging with gratitude the grace and beneficence of God, in permitting us to make choice of our form of government, do establish this constitution.”¹¹²

107. Kentucky adopted two constitutions during this era: one (upon admission to the union) in 1792, and another in 1799.

108. Mississippi adopted two constitutions during this era: one in 1817, and one in 1832.

109. ME. CONST. of 1820, pmbl. (“We the people of Maine . . . acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring his aid and direction in its accomplishment . . . do ordain and establish the following Constitution . . .”).

110. ME. CONST. of 1820, pmbl.

111. CONN. CONST. of 1818, pmbl.

112. N.Y. CONST. of 1821, pmbl.

The Connecticut and New York preambles asserted that God had endowed the people with the right to create free governments, just as the earlier Type 1 preambles asserted that the right to constitute a government, like all other natural rights, derived from God. But the two preambles differed from those earlier preambles in two important ways. First, they contained an explicit expression of gratitude to God for permitting the people to create free governments. Second, they referred to God's grace, providence, and beneficence in allowing the people the opportunity to create free governments. To be sure, the references to grace, providence, and beneficence appear to contemplate divine involvement beyond the mere act of creation—a claim made largely in Calvinist language—but nonetheless suggest a certain distance between God and human action. On this view, God creates man, and God's plan for human history permits the creation of free government. Because the preambles do not assert any further role for God in the development of human history, we treat them as the second phase in the development of Type 1 preambles.

Connecticut's 1818 constitution was the state's first post-independence charter; for the first several decades after independence, the state had relied on its 1662 Royal Charter, which retained many elements of the Fundamental Orders of 1639, which the local government had adopted to identify the scope of its authority and responsibilities.¹¹³ In addition to the desire to adopt a constitution expressly approved by the people, Connecticut adopted the 1818 constitution in large part to disestablish the church. (Connecticut, like Massachusetts, had a long tradition of state sponsorship of religion.) Records of the convention are sparse; it was not open to the public, and the official journal of the convention, published more than a half-century later, provides only brief minutes and voting records and states simply that the preamble "was [] read and approved."¹¹⁴ Contemporaneous accounts in newspapers do not reveal any controversy over the wording of the preamble.¹¹⁵

New York convened a constitutional convention in 1821 in part because of a power struggle between the Governor and the legislature.

113. See 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 38, at 519–37.

114. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF CONNECTICUT, HELD AT HARTFORD IN 1818, at 17 (1873), <http://babel.hathitrust.org/cgi/pt?id=hvd.hxt8rz;view=1up;seq=1> [<https://perma.cc/JCG4-QHBN>].

115. See Wesley W. Horton, *Annotated Debates of the 1818 Constitutional Convention*, 65 CONN. B.J. SI-3, SI-24 (1991).

Although there was meaningful debate about a proposal to shield witnesses in court from questions about their religious faith¹¹⁶ and about the clause that would guarantee the free exercise of religion (and in particular what it reflected about the legal status of Christianity),¹¹⁷ the notes from the convention do not reveal any controversy over the language used in the preamble.¹¹⁸ The lack of controversy is not surprising: it appears that the convention simply borrowed the language from Connecticut's 1818 preamble; New York's previous constitution had referred to God in the preamble; and the state had at least some history with established churches.¹¹⁹

Although the records of New York and Connecticut's conventions are sparse, their adoption of language referring to God is not surprising when viewed in light of an eventually dominant religious movement that emerged during this era. By mid-century, the Second Great Awakening would reach into virtually every aspect of American life, including politics and the process of constitution-making.¹²⁰ Like the First Great Awakening, this movement focused on personal salvation and moral growth, but it went beyond the prior movement by insisting that the whole community, rather than just the individual, is the object of divine transformation.¹²¹

This movement of national evangelical revival is traditionally traced to an 1801 camp meeting in Cane Ridge, Kentucky, that included a diverse array of Protestant ministers and attracted between 10,000

116. NATHANIEL H. CARTER ET AL., REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 465-66 (1821).

117. *See id.* at 574-76.

118. Peter H. Wendover, a Democratic-Republican member of the United States Congress and a delegate at the 1821 convention, proposed the language of the preamble. It was referred to a committee and eventually adopted as proposed. *See id.* at 606. The records do not reveal any debate or controversy over the language.

119. *See HUTSON, supra* note 51, at 65-66.

120. *See, e.g.,* WILLIAM G. MCLOUGHLIN, REVIVALS, AWAKENINGS, AND REFORM: AN ESSAY ON RELIGION AND SOCIAL CHANGE IN AMERICA, 1607-1977, 134-35 (1978). The Second Great Awakening, which was perhaps the most powerful religious movement in U.S. history, has received little attention in the legal academy, and certainly far less than that focused on religion in the founding era.

121. C. C. GOEN, BROKEN CHURCHES, BROKEN NATION: DENOMINATIONAL SCHISMS AND THE COMING OF THE AMERICAN CIVIL WAR 23-33 (1985); NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 62-64, 71-73, 206-09 (1989); *see generally* RICHARD J. CARWARDINE, EVANGELICALS AND POLITICS IN ANTEBELLUM AMERICA (1993) (exploring evangelical involvement in each election cycle between 1840 and 1860).

and 20,000 worshippers during the week-long event.¹²² Over the next two decades, the Cane Ridge meeting inspired similar camp meetings across the frontier, as well as the renewal of revival meetings in settled areas of the country.¹²³ In some places—principally in the South—the movement retained virtually all of the hallmarks of the First Great Awakening, with its focus on an authentic individual experience of rebirth in the Spirit; it represented merely a revival of those themes several decades later, and had as its basic objective to bring back to church people who had been largely absent from the pulpits towards the end of the eighteenth century.¹²⁴ In the North, however, the new evangelical revival attracted the attention of religious leaders who envisioned something more than simply the prior century's focus on the individual's moral and spiritual life.

Although these religious figures—including Henry and Lyman Beecher, Charles Grandison Finney, and many others—frequently differed on doctrinal points, they were all deeply influenced by the Puritan ideas of a holy land and a holy people.¹²⁵ On the Puritan view, the new world represented an opportunity to create a holy community, composed of confirmed believers free to govern themselves according to God's law.¹²⁶ To leading religious thinkers of the Second Great Awakening, in contrast, the American people as a whole—rather than those who had already conformed their beliefs and actions to the demands of the church—have a special place in the divine plan. On this view, America was God's project; the American continent was God's chosen place for the restoration of authentic Christianity, freed from Europe's burden of established churches and Roman Catholicism, and the American people were the present or potential congregants in God's church.¹²⁷ Rather than emphasizing the boundaries of the church as those who have already been saved, the leaders of the Second Great Awakening emphasized the potential for redemption of the entire political community. Indeed, the movement's enthusiastic

122. See WILLIAM G. MCLOUGHLIN, *REVIVALS, AWAKENINGS, AND REFORM: AN ESSAY ON RELIGION AND SOCIAL CHANGE IN AMERICA, 1607-1977*, at 134-35 (1978); JOHN WOLFFE, *THE EXPANSION OF EVANGELICALISM; THE AGE OF WILBERFORCE, MORE, CHALMERS AND FINNEY* 58-59 (2007).

123. See MCLOUGHLIN, *supra* note 122, at 131-38; WOLFFE, *supra* note 122, at 59-62.

124. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815-1848*, at 187-88 (2007); MCKENNA, *supra* note 52, at 131.

125. See MCKENNA, *supra* note 52, 88-100.

126. See *id.* at 37.

127. See *id.* at 88-100, 126-27

missionary efforts reflected an acknowledgment that not all were yet saved, but that all could be reached and transformed by God's grace.¹²⁸

For the movement's leaders, the impact of God's grace did not stop with individuals and their growth in faith. Instead, the leaders emphasized the importance of transforming the moral life of the whole political community.¹²⁹ Thus, the Second Great Awakening was marked by huge growth in the number of organizations devoted to moral improvement. These moral concerns included public education, alcohol abuse, and (for those on the more radical side of the movement) slavery.¹³⁰ Accordingly, organizations inspired by the Second Great Awakening urged the creation of common schools (typically with a distinctively Protestant character); temperance (enforced through pledges and, less successfully, legislation); and abolitionism.¹³¹ In the 1830s, this movement began to have a dramatic effect not only on personal religious practices, but also on ideas about the proper domain of civil government.¹³²

This close relationship between faith and government, however, did not trigger concerns among followers of the movement about theocracy. Indeed, those influenced by the Second Great Awakening strongly opposed any hint of theocracy, as evidenced by evangelical Protestants' attacks on Roman Catholics and, later, Mormons.¹³³ They viewed these religious traditions, unlike the Protestantism that they preached, as impermissibly blending religious and political domination over individual freedom in both domains. Because they believed that the experience of salvation is authentic only if the product of voluntary choice, these evangelicals rejected any idea of a hierarchically enforced religious orthodoxy, especially if that religious hierarchy was intertwined with the power of the state.¹³⁴

Nonetheless, the fruits of their efforts are still rightly called the "Protestant Establishment" because of the movement's contention that religious values—by which they generally meant Protestant values—should permeate all dimensions of life.¹³⁵ One manifestation of this

128. WOLFFE, *supra* note 122, at 58.

129. MCLOUGHLIN, *supra* note 122, at 101-06.

130. *Id.* at 136-37.

131. See GREEN, THE SECOND DISESTABLISHMENT, *supra* note 68, at 265.

132. See SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 19-20 (2002).

133. See *id.* at 55-83.

134. See *id.*; see also Esbeck, *supra* note 86, at 1395-96.

135. See GORDON, *supra* note 132, at 70-73.

project was the increasingly common practice of public recognition of God. For example, the movement encouraged bible reading and non-sectarian prayer in common schools, both to promote morality and to encourage students to acknowledge God.¹³⁶ Importantly, the proponents of this practice understood it to be compatible with religious liberty because they believed that this form of bible reading and prayer was open to persons of all faiths and neither advanced nor required the acceptance of the doctrines of any specific denomination.¹³⁷

Acknowledgment of God in the preambles to state constitutions would eventually become another prominent manifestation of this practice. Although the Second Great Awakening would have a significant impact on state constitution-making after 1840, however, its influence before 1840 appears to have been limited to Connecticut's and New York's constitutions. This pattern is not surprising, however, when one considers the gradual geographical spread of the Second Great Awakening. Although the Cane Ridge revival in Appalachia marked its beginning, the political implications of the movement first emerged in the Northeast, where religious leaders fused Puritanism's emphasis on the holy community with the First Great Awakening's focus on personal salvation.¹³⁸ The movement was most influential in New England and New York, part of which came to be known as the "Burned-Over District" because of the religious fervor of its inhabitants.¹³⁹ Indeed, of the seven states in this region, the only three to approve new constitutions between 1800 and 1840 adopted preambles acknowledging God.

Those three states, however, were the exception to the rule, rather than the norm. For a half-century after the ratification of the Constitution, most state preambles did not refer to God. Indeed, of the twenty-six states that formed the original union or joined the union before 1840, only six (including Pennsylvania, which dropped its earlier reference to God during this period) adopted constitutions with preambles referring to God between 1776 and 1840.¹⁴⁰ This is notwithstanding the fact that during this era the twenty-six states collectively

136. See GREEN, *THE SECOND DISESTABLISHMENT*, *supra* note 68, at 265.

137. See *id.* at 255-56.

138. See M'CLOUGHLIN, *supra* note 122, at 137, 114-15.

139. See BARRY HANKINS, *THE SECOND GREAT AWAKENING AND THE TRANSCENDENTALISTS* 15-19 (2004).

140. As noted above, New York adopted two different constitutions with different references to God during this period. Accordingly, the states collectively adopted seven constitutions with such references in this era.

adopted thirty-nine new constitutions.¹⁴¹

C. 1840–1860

This began to change in the 1840s. Between 1840 and 1860, eighteen states adopted a total of twenty constitutions. (Louisiana and Iowa each adopted two constitutions during this era.) Of those twenty, thirteen referred to God, including the original constitutions of five of the six states that joined the union during this era and constitutions in four other states that previously had adopted constitutions that did not refer to God.¹⁴² In this era, in other words, almost two-thirds of the constitutions (and more than two-thirds of the states that adopted constitutions) incorporated language referring to God.

The language used in some of those references also changed in subtle but important ways, incorporating language that makes more robust theological claims about God's role in public life and the development of human history. During this era, Rhode Island, New Jersey, Iowa, and Illinois adopted constitutions with Type 2 preambles—that is, preambles that not only expressed gratitude to God for liberty, but also actively sought God's blessing for future endeavors. To be sure, Type 2 preambles did not become the norm; during this era, Texas, New York, Wisconsin, California, Maryland, Ohio, Indiana, and Minnesota adopted Type 1 preambles—that is, preambles that only expressed gratitude to God for liberty, thereby avoiding, at least expressly, the more robust theological claim that God has the power to direct the course of human affairs. But the trend unmistakably was toward the invocation of God in preambles. Indeed, although a majority of the constitutions adopted during this era used Type 1, rather than Type 2, language, three of the states that adopted Type 1 preambles did so while replacing constitutions whose preambles had not referred to God at all.

Because the conventional approach in preambles changed substantially in this era, we give even closer consideration to the circumstances that produced those changes, and to the debates—where available—in the constitutional conventions that led to the adoption of new constitutions.

141. Rhode Island did not adopt any constitutions during this era; it relied on its colonial charter until 1843, when it adopted its first state constitution.

142. Iowa adopted two constitutions during this era, both of which referred to God; Louisiana (twice), Florida, Michigan, Indiana, Virginia, and Kentucky adopted constitutions that did not refer to God.

The four states that adopted Type 2 preambles during the 1840s perfectly fit the pattern of the Second Great Awakening's migration. The movement spread from the Northeast to the Ohio Valley and the upper Midwest. The states that adopted more robustly theological language in their preambles in this era were either in the Northeast (Rhode Island and New Jersey) or in the Ohio Valley and Midwest (Iowa and Illinois).

One way of measuring the impact of the Second Great Awakening on state constitution-making in this era is by considering the political influence of the Whig Party. The Whigs generally supported modernization, the banking system (and thus fewer constraints on banks), and economic protectionism.¹⁴³ More important for our purposes, the Whigs were predominantly Protestant, and many were evangelical.¹⁴⁴ Although not every member of the Whig Party shared all of the theological presuppositions of the Second Great Awakening, they certainly shared the movement's emphasis on moral transformation, both for the individual and the broader political community.¹⁴⁵ Members of the Whig Party, as a consequence, often supported temperance laws, common schools, and laws against gambling.¹⁴⁶ This is not to suggest that members of the rival Democratic Party in this era were hostile to religion; instead, they parted ways with the Whigs (and the Second Great Awakening) over the appropriate role of government in moral transformation (and, of course, over the issue of slavery). Democrats rarely aggressively opposed Whig efforts to incorporate religious language in preambles, as they apparently did not view it as a matter of great importance.

Not surprisingly, Whig delegates played central roles in the crafting of the preamble language in the states whose constitutions referred to God. The trend began with the adoption of the Rhode Island constitution in 1843, the state's first post-independence constitution. The state adopted the constitution after Thomas Wilson Dorr challenged the authority of the state by leading a formally unsanctioned constitutional convention that purported to create a new, more democratic

143. MCKENNA, *supra* note 52, at 105.

144. *Id.* at 107–08.

145. *See id.* at 149.

146. *See id.* at 80; Robert Cook, *The Political Culture of Antebellum Iowa: An Overview*, in IOWA HISTORY READER 96 (Marvin Bergman ed., 2008) (noting that the “Whigs advocated the use of government to create a truly Protestant republic—by preventing liquor sales, for example”). Many Whigs also criticized President Jackson's Indian-removal policies on moral and religious grounds.

constitution for the state.¹⁴⁷ The preamble of the state's 1843 constitution provides: "We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations, do ordain and establish this constitution of government."¹⁴⁸ The journal of the 1842 convention mentions the preamble only once—in noting that it was proposed and adopted—and does not reveal any controversy over the language.¹⁴⁹ Instead, most of the focus at the convention was on the property requirements for voting and suffrage for blacks and immigrants.

The composition of the convention, however, helps to explain the language of the preamble, and in particular its more robust theological claim about God's continuing involvement in human history. Most of the Dorrists were Democrats (or former Democrats), and although many Democrats did not agree with Dorr's efforts, his movement was popular enough that it sapped Democratic strength at the convention. As a consequence, the 1842 convention that produced the state's new constitution was dominated by delegates from the Whig Party,¹⁵⁰ which had controlled the state's pre-existing government¹⁵¹ and served as the principal political opposition in this era to the Democrats.

In New Jersey one year later, the convention called to adopt a new constitution approved a preamble with language virtually identical to Rhode Island's.¹⁵² The records of the convention do not reveal any debate over the preamble and its reference to God.¹⁵³ But Jonathan J.

147. See PATRICK T. CONLEY, *DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT 1776-1841*, at 309 (1977) (describing the so-called "People's Convention").

148. R.I. CONST. of 1843, pmb.

149. JOURNAL OF THE CONVENTION ASSEMBLED TO FRAME A CONSTITUTION FOR THE STATE OF RHODE ISLAND AT NEWPORT, SEPTEMBER 12, 1842, at 40-41 (1859).

150. See CONLEY, *supra* note 147, at 351 ("Senator James Fowler Simmons and the Whig faction that he directed loomed large in the deliberations which produced a basic law modeled on the Landholders' Constitution.").

151. See *id.* at 298 ("The election of 1840 brought complete victory to Rhode Island's Whigs.").

152. N.J. CONST. of 1844, pmb. ("We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this constitution.").

153. See JOURNAL OF THE PROCEEDINGS TO FORM A CONSTITUTION FOR THE GOVERNMENT OF THE STATE OF NEW JERSEY 81-82 (1844) [hereinafter NEW JERSEY JOURNAL] (noting that Mr. Spencer reported the draft preamble, which was in the form that ultimately

Spencer, a physician who chaired the committee that drafted the language and who proposed the language to the convention, was a prominent member of the Whig Party.¹⁵⁴ To be sure, Whigs did not dominate the convention in New Jersey the way they had in Rhode Island,¹⁵⁵ and Whigs and Democrats had roughly equal numbers of supporters in New Jersey in 1844.¹⁵⁶ But the same year that New Jersey adopted its new constitution, the Whig party nominated Theodore Frelinghuysen of New Jersey, an active evangelical Christian known as the “Christian statesman,” as its candidate for Vice President.¹⁵⁷ There thus is reason to believe that New Jersey Whigs at the time shared the more general evangelical fervor inspired by the Second Great Awakening held by Whigs elsewhere.¹⁵⁸

Two years later, in 1846, Iowa adopted a constitution upon admission to the union with a preamble similar to Rhode Island’s and New Jersey’s.¹⁵⁹ The preamble provided in relevant part, “We, the People of

would be adopted).

154. Spencer had been a Whig candidate for Congress and, a year after serving as a delegate at the constitutional convention, was nominated as the Whig candidate for Governor, though he declined the nomination. See THE COUNTRY PRACTITIONER, OR, NEW JERSEY JOURNAL OF MEDICAL AND SURGICAL PRACTICE 47 (1879–1881).

155. See BARBARA G. SALMORE & STEPHEN A. SALMORE, NEW JERSEY POLITICS AND GOVERNMENT: THE SUBURBS COME OF AGE 134 (3d ed. 2013).

156. See *id.* (“Delegates to the 1844 constitutional convention . . . divided almost exactly between Whigs and Democrats . . .”). Henry Clay, the Whig candidate for President, carried New Jersey in the 1844 presidential election in a very close vote; Clay won 50.46% of the popular vote to James K. Polk’s 49.39%. See 1844 Presidential General Election Results, ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/national.php?year=1844> [<https://perma.cc/TB42-5RRD>] (last visited Apr. 24, 2017).

157. See *James K. Polk: Campaigns and Elections*, MILLER CENTER, <https://millercenter.org/president/polk/campaigns-and-elections> [<https://perma.cc/2WAJ-XK9P>] (last visited Apr. 24, 2017).

158. Indeed, another likely Whig delegate, Richard S. Field, began the convention by successfully moving a resolution to “acknowledge our dependence upon God, and invoke his blessing upon our labours,” and to open “every morning [of the convention] with prayer.” NEW JERSEY JOURNAL, *supra* note 153, at 18–19. Field eventually was appointed by a Republican Governor to serve out the term of an open Senate seat, and President Lincoln later appointed him to serve as a federal district court judge. See *Richard S. Field: Attorney General*, DEP’T L. & PUB. SAFETY, http://nj.gov/oag/oag/ag_1838-1841_field_bio.htm [<https://perma.cc/XL9K-P5JC>] (last visited Apr. 24, 2017). The Whig Party had dissolved by 1862, but most of its members had become Republicans.

159. The language in the preamble was originally drafted and adopted in a convention in 1844, as part of a constitution that the voters twice narrowly rejected because of a dispute with Congress over the boundaries of the state. See FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL DEBATES OF 1844 AND 1846, at 234, 247–55 (Benjamin F. Shambaugh ed., 1900) [hereinafter Shambaugh]. See also IOWA CONST. of 1844, pmb.; Louis Pelzer, *The*

the Territory of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa”¹⁶⁰ Unlike the partisan demographics of the Rhode Island and New Jersey conventions, more than two-thirds of the delegates elected to the convention were Democrats, and less than one-third were Whigs.¹⁶¹ As a consequence, the constitution that they proposed (like the virtually identical 1846 document) was a “largely Jacksonian creation,”¹⁶² in particular in its treatment and regulation of banks¹⁶³ and its refusal to extend voting rights to black citizens.¹⁶⁴ But the Iowa Whigs, who like Whigs elsewhere tended to be evangelical Protestants who favored “using the legislature and courts to enforce basic standards of Protestant morality,”¹⁶⁵ appear to have exerted their influence in the drafting and adoption of the preamble.

The Committee on State Boundaries drafted the initial version of the preamble, suggesting that the principal purpose of the preamble would be to identify the state’s borders. The initial draft that the Committee proposed did not refer to God; instead, it borrowed the purposes stated in the preamble of the federal Constitution and identi-

History and Principles of the Whigs of the Territory of Iowa, in 5 IOWA JOURNAL OF HISTORY AND POLITICS 77-85 (Benjamin F. Shambaugh ed., 1907) [hereinafter Pelzer]. There does not appear to have been any debate at the 1846 convention about the portion of the preamble referring to God that had been adopted at the 1844 constitution. The 1846 constitutional convention met for only fifteen days and used as its template the constitution adopted in the convention two years earlier. See Shambaugh, *supra* note 159, at 414. Because the 1844 convention drafted the preamble, we consider that convention in our discussion above.

160. IOWA CONST. of 1846, pmb1.

161. Shambaugh, *supra* note 159, at app. A at 410 (stating that there were fifty-one Democrats and twenty-one Whigs). The ratio of Democrats to Whigs was similar at the 1846 convention, which had twenty-two Democrats and ten Whigs. See *id.* at app. B at 415.

162. Cook, *supra* note 146, at 94.

163. The constitution prohibited the creation of any bank that would issue notes that could circulate as currency. See IOWA CONST. of 1846, art. 9, § 1.

164. See IOWA CONST. of 1846, art. 3, § 1. In contrast, Iowa’s Whigs, similar to Whigs elsewhere at the time, favored a broader range of rights for African Americans and thus opposed “the state’s virulently racist stance on black in-migration.” Cook, *supra* note 146, at 95. Although the Whigs were more supportive than Democrats of the rights of black citizens, many Catholic Iowans of Irish and German descent viewed the Whig party as a “vehicle for bigoted evangelical Protestantism.” Cook, *supra* note 146, at 97.

165. Cook, *supra* note 146, at 95; see also *id.* (“Much (though by no means all) of the support for the so-called blue laws against gambling, desecration of the sabbath, and drinking came from the Whigs.”); Pelzer, *supra* note 159, at 193-212.

fied the proposed boundaries of the state.¹⁶⁶ When the Committee reported its draft to the Committee of the Whole, the convention considered and adopted several amendments to the language, including an amendment, moved by a Whig delegate named Caleb B. Campbell,¹⁶⁷ to insert in the preamble the phrase “grateful to the Supreme Ruler of the Universe, for the blessings hitherto enjoyed as a people, and acknowledging our dependence upon Him for the continuation of those blessings.”¹⁶⁸ Unlike other matters at the convention touching on religion,¹⁶⁹ the journal of the convention does not reveal any debate over the proposal, stating merely that the amendment “was agreed to.”¹⁷⁰

The preamble to Illinois’s 1848 constitution borrowed both from the federal preamble, in its statement of purposes, and from the preambles adopted in Rhode Island and New Jersey several years earlier, in its reference to God.¹⁷¹ (The preamble to the state’s original constitution, adopted upon admission to the union in 1818, did not refer to God.) The records of the 1847 convention do not include detailed accounts of the debates, but it is clear that the initial draft of the preamble, proposed by the convention’s Committee on Law Reform, did not refer to God; instead, it borrowed the federal preamble, simply substi-

166. See JOURNAL OF THE CONVENTION FOR THE FORMATION OF A CONSTITUTION FOR THE STATE OF IOWA 17 (1845) [hereinafter IOWA JOURNAL].

167. See Shambaugh, *supra* note 159, at app. at 405–15 (providing roster of delegates to the convention, with party affiliations).

168. IOWA JOURNAL, *supra* note 166, at 46.

169. There was controversy over an earlier motion by a Whig delegate (and supported by most Whig delegates) to begin each session with prayer “to Almighty God,” which Democratic delegates defeated. See *id.* at 16, 31 (motion of Elijah Sells); Cook, *supra* note 146, at 94 n.19; Shambaugh, *supra* note 159, at 12–20; see also *id.* at 175–81 (newspaper coverage of debate). There was also controversy over a proposed provision to prohibit discrimination on the basis of religion, see IOWA JOURNAL, *supra* note 166, at 48, and whether that clause or a religious test clause would be interpreted to permit atheists to testify in court, see *id.* at 38–41; Shambaugh, *supra* note 159, at 25.

170. IOWA JOURNAL, *supra* note 166, at 46. The Committee on Revision did not propose any changes to the amended language, and the convention approved the preamble as amended. See Shambaugh, *supra* note 159, at 156.

171. We, the people of the State of Illinois grateful to Almighty God for the civil, political, and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, in order to form a more perfect government, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the State of Illinois.

ILL. CONST. of 1848, pmb1.

tuting “the State of Illinois” for “the United States of America.”¹⁷² The convention then referred the draft of the preamble and the first few articles to the Committee on Revision and Adjustment of the Articles of the Constitution.¹⁷³ When the Committee reported its draft to the convention the following week, William Thomas, a Whig delegate,¹⁷⁴ moved to amend the preamble by adding the clause expressing gratitude to God for the liberty that “He has so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations.”¹⁷⁵ The records of the convention simply state that “the question was taken, and the preamble, as amended, adopted.”¹⁷⁶

In seeking a divine blessing for the people’s future attempts at self-governance, the 1840s preambles adopted in Rhode Island, New Jersey, Iowa, and Illinois strongly echoed the Puritan-influenced language of the 1780 Massachusetts preamble. As we have noted, the geographical pattern of the Second Great Awakening’s influence, and the Whig influence on the crafting of the preambles, suggests that the choice of the more robustly theological Type 2 language in these states was intentional.

In this era, New York, Wisconsin, California, Maryland, Ohio, Indiana, and Minnesota also adopted preambles referring to God, albeit without an express request for a Divine blessing. Even though they all adopted Type 1 language, the mere fact that they referred to God in their preambles was itself a mark of the influence, in some states more obviously than others, of the Second Great Awakening. We have already described the influence of the movement in New York, and four of the other states to adopt Type 1 preambles in this era were in the Ohio Valley and the upper Midwest, to which the movement initially

172. See JOURNAL OF THE CONVENTION, ASSEMBLED AT SPRINGFIELD, JUNE 7, 1847, at 395 (1847) [hereinafter ILLINOIS JOURNAL].

173. *Id.* at 439–40.

174. See THE CONSTITUTIONAL DEBATES OF 1847, in 14 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY 978–83 (Arthur C. Cole ed., 1919) [hereinafter ILLINOIS DEBATES] (providing biographical information about delegates). It is not clear if support for including devotional language was limited to Illinois Whigs. A committee equally divided between Whig and Democratic delegates drafted an “address to the people of the state” to accompany the draft constitution that concluded with “an appeal to Almighty God.” ILLINOIS JOURNAL, *supra* note 172, at 532–36; see also ILLINOIS DEBATES, *supra* at 953, 955–57, 967, 970, 980 (providing biographical information about delegates).

175. ILLINOIS JOURNAL, *supra* note 172, at 511.

176. *Id.*; see also ILLINOIS DEBATES, *supra* note 174, at 931.

expanded.¹⁷⁷ In addition, although the preambles in these states merely expressed gratitude to God rather than invoking God's blessing, in every case other than New York they represented each state's first acknowledgment of God in its constitution.

The preambles in these states all follow the same verbal formula, expressing gratitude to God for liberty,¹⁷⁸ freedom,¹⁷⁹ or the right to choose a form of government¹⁸⁰ without explicitly seeking a continued blessing upon human endeavors.¹⁸¹ Although they differed from Connecticut's earlier Type 1 preamble in the language they used to express gratitude to God, the basic characteristics of the preambles echoed Connecticut's earlier approach, and became the model for future Type 1 preambles. California's 1849 preamble is typical; it provides, "We, the people of California, grateful to Almighty God for our freedom in order to secure its blessings, do establish this Constitution."¹⁸²

In some of these states, there was no controversy at all over the adoption of language referring to God. At the New York convention in 1846, for example, the discussion about the proposed preamble was brief, did not focus on the reference to God, and was, as one delegate stated, an "unimportant matter."¹⁸³ The lack of controversy is likely explained by the fact that New York replaced a constitution (from 1821) that already included an earlier version of a Type 1 reference to God in the preamble.¹⁸⁴

177. See MCLOUGHLIN, *supra* note 122, at 130.

178. See MD. CONST. of 1851, pmb.; MINN. CONST. of 1858, pmb.

179. CAL. CONST. of 1849, pmb.; N.Y. CONST. of 1846, pmb.; OHIO CONST. of 1851, pmb.; WIS. CONST. of 1848, pmb.

180. IND. CONST. of 1851, pmb.

181. The only other state to adopt a preamble with a reference to God during this era was Texas, whose 1845 constitution upon admission to the union "acknowledg[ed] with gratitude the grace and beneficence of God, in permitting us to make a choice of our form of government." TEX. CONST. of 1845, pmb. The preamble thus echoed the earlier Type 1 preambles of Connecticut and New York, referring to the "grace and beneficence of God." Texas later adopted a new constitution with a Type 2 preamble. See TEX. CONST. of 1876, pmb.

182. CAL. CONST. of 1849, pmb.

183. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1054 (1846) (comments of Mr. Kirkland). One delegate complained that the proposed preamble was "too narrow," because the delegates "established the Constitution for something besides freedom," *id.* at 1054 (comments of Mr. Simmons), and another delegate moved to strike out the proposed preamble and replace it with the preamble from the 1821 constitution, *id.* (comments of Mr. Tallmadge). After brief discussion, the amendment failed, and the delegates then voted unanimously to adopt the language proposed by the committee. *Id.*

184. See *supra* notes 112, 117-20. The preamble to the 1846 constitution provided, "We,

In other states there was modest controversy over whether a reference to God in the preamble was appropriate. At Wisconsin's 1846 convention in anticipation of admission to the union, for example, an influential delegate¹⁸⁵ moved to strike the language in the proposed preamble that referred to God,¹⁸⁶ arguing that the proposed constitution said enough about the subject of God in the bill of rights, presumably in the provision addressing the free exercise of religion.¹⁸⁷ The convention overwhelmingly rejected the motion,¹⁸⁸ however, and ultimately adopted language referring to God that was identical to the reference in New York's 1846 constitution.¹⁸⁹ There was a similarly brief debate at the 1850 Maryland convention over whether to refer to God in the preamble. After a committee drafted the initial version of the preamble, adhering closely to the language of the preamble to the state's prior constitution,¹⁹⁰ a delegate moved to amend the proposal to

the people of the State of New York, grateful to Almighty God for our freedom; in order to secure its blessings, do establish this Constitution." N.Y. CONST. of 1846, pmbl.

185. See THE CONVENTION OF 1846, in 27 PUBLICATIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 794 (Milo M. Quaife ed., 1919) [hereinafter THE CONVENTION OF 1846] ("The first constitution probably owed more to Mr. [Moses] Strong's influence than to that of any other man.").

186. The proposed preamble would have "acknowledge[ed] with gratitude the grace and beneficence of God in permitting us to make choice of our form of government." See JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 50, 628 (1848) [hereinafter WISCONSIN 1847 JOURNAL] (report of the committee on general provisions).

187. THE CONVENTION OF 1846, *supra* note 185 at 389.

188. *Id.* (noting that the vote against Strong's motion was 73-10).

189. WIS. CONST. of 1848, pmbl. ("We, the people of Wisconsin, grateful to Almighty God for our freedom; in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare; do establish this Constitution."). The debate over the preamble's language took place at the 1846 convention, which drafted a constitution that voters rejected because of controversial provisions on banking and other matters. The state drafted another constitution at a new convention in 1848, which the voters approved. The preamble to that document, unlike the preamble in the failed 1846 document, was identical to New York's 1846 constitution, with the addition of three secular purposes. There does not appear to have been any debate at the second convention about the language of the preamble, nor any explanation for why the delegates chose not to adopt the "grace and beneficence" formulation used in the rejected 1846 version. See WISCONSIN 1847 JOURNAL, *supra* note 186, at 50 (report of the committee on general provisions, which drafted the preamble); *id.* at 143 (convention vote on the preamble and the declaration of rights, which were approved by a large margin).

190. After stating a grievance with the Crown, the preamble to Maryland's 1776 constitution stated: "[W]e, the Delegates of Maryland, in free and full Convention assembled, taking into our most serious consideration the best means of establishing a good Constitution in this State, for the sure foundation and more permanent security thereof, declare . . ." MD. CONST. of 1776, pmbl.

add an expression of gratitude to God.¹⁹¹ Because there was also brief debate over whether the preamble should expressly declare the constitution an act of the people, another delegate proposed language that would do so, but that did not contain any reference to God.¹⁹² The dueling proposals—with one referring to God and the other without any such reference—prompted only brief discussion about whether a reference to “Almighty God” would be consistent with the convention’s earlier decision (ultimately revisited) to adopt a provision protecting persons from disqualification as witnesses, jurors, or officeholders if they “believe[] in the existence of a God.”¹⁹³ The convention ultimately adopted the version of the preamble that expressed gratitude to God for “civil and religious liberty”¹⁹⁴ (and changed the language of the qualification provision).

In other states, in contrast, there was substantial controversy over whether to refer to God. At the 1849 convention to adopt California’s first constitution, there was a robust debate over the proposal from the committee charged with drafting the preamble, which proposed lan-

191. PROCEEDINGS OF THE MARYLAND STATE CONVENTION TO FORM A NEW CONSTITUTION 260 (1850) [hereinafter MARYLAND PROCEEDINGS]; DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 236 (1851) [hereinafter MARYLAND DEBATES] (referring to motion of Mr. Parke) (moving to amend the proposal to state, “We, the people of Maryland, grateful to Almighty God for our own freedom, in order to establish justice, maintain public order, and perpetuate liberty, do ordain this Constitution.”). See also *id.* at 238 (comments of Mr. Parke) (stating that “the great object of his amendment, was to acknowledge our gratitude to Almighty God for the signal blessings which he had bestowed upon us”). Mr. Parkes did not object to the another delegate’s friendly amendment to change the proposal to express gratitude “to Almighty God for our civil and religious liberty,” rather than for “our freedom.” MARYLAND PROCEEDINGS, *supra* note 191, at 260–61.

192. MARYLAND DEBATES, *supra* note 191, at 238–39 (“Mr. John Newcomer now offered his substitute for the preamble, as follows: ‘We, the people of the State of Maryland, by our delegates in Convention assembled at the City of Annapolis, taking into our most serious consideration the best means of establishing a good Constitution in this State, declare’”); MARYLAND PROCEEDINGS, *supra* note 191 at 260–61.

193. The convention had previously adopted a provision that prohibited the exclusion of persons as witnesses, jurors, or officeholders so long as they “believe[] in the existence of a God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or in the world to come.” MARYLAND DEBATES, *supra* note 191, at 4–5. One delegate argued in favor of the version of the preamble without a reference to God only because he thought it the only approach consistent with that prior vote. *Id.* at 239 (comments of Mr. Chambers). The convention eventually changed the language in the qualification clause to protect persons who believe “in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or in the world to come.” MD. CONST. of 1851, art. 33.

194. MD. CONST. of 1851, pmb1.

guage consciously borrowed from New York's 1846 constitution.¹⁹⁵ When the committee first reported its proposal to the convention, Seranus Hastings, a delegate who later became California's first Chief Justice, stated that he could not "see the necessity of inserting in an instrument of this kind a prayer to Almighty God."¹⁹⁶ Charles Botts (another future state judge), who proposed alternative language that did not refer to God,¹⁹⁷ declared that he "had always been opposed to the abuse of the language of prayer and thanksgiving on occasions of this kind" because he "thought there was an inappropriateness in it," principally because it would force some of the people, in voting to adopt the document, to "say what [they] do[] not intend to say."¹⁹⁸ In his view, "the closet is the proper place for devotion—not the ballot-box."¹⁹⁹ Other delegates defended the reference to God, arguing that "we should make a due reference to the Supreme Being in performing a work of such magnitude and importance as this,"²⁰⁰ and that "[i]f we can, by supposition, get a prayer out of those who are not in the habit of praying, we should by all means do it."²⁰¹ Although the delegates, acting as a committee of the whole, initially adopted one of several proposals for the preamble with no reference to God,²⁰² they eventually returned to the original proposal of the committee on the constitu-

195. The proposal of the Committee on the Constitution read: "We, the people of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution." REPORT OF THE DEBATES OF THE CONVENTION IN CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 378–79 (1850) [hereinafter CALIFORNIA DEBATES]. There was also debate over whether the preamble should refer to the people of the "State" of California when, until admission, California would merely retain the status of a territory. *See id.* at 379 (comments of Mr. Shannon). In addition, some delegates thought that a preamble was unnecessary, and that if there were a preamble, the shorter the better. *Id.* (comments of Mr. Hastings); *id.* at 379–80 (referring to comments of Mr. McCarver) ("If we sit here much longer we will have a resolution to annex New York, Constitution and all").

196. *Id.* at 379.

197. *Id.* at 416 ("In order to institute a government, the free and independent people of California do ordain as follows").

198. *Id.* (comments of Mr. Botts).

199. *Id.*

200. *Id.* at 417 (comments of Mr. Steuart); *see also id.* at 379 (comments of Mr. Norton) (stating that "it is proper, doing so solemn an act, that we should make a due reference to the Supreme Being").

201. *Id.* at 417 (comments of Mr. Norton); *see also id.* at 416 (stating that "although we may not (some of us at least) be in the habit of praying, where an opportunity occurs when it would be not only appropriate but proper to do so, that we should do it").

202. *Id.* at 417.

tion, which they adopted with minor modifications.²⁰³ The adopted version of the preamble provides, “We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.”

At Indiana’s 1850 constitutional convention, there similarly was substantial debate over whether to include a reference to God and, in particular, whether the reference should make broad theological claims. The committee charged with drafting the preamble proposed language that did not refer to God,²⁰⁴ but a delegate, Mr. Hall, moved to amend the proposed preamble by substituting language “acknowledging the gracious providence of God, in bestowing upon us the great and manifold blessings of a Christian civilization.”²⁰⁵ He argued that such language was appropriate for a Christian people, and he presented petitions from citizens of the state asking for such a statement.²⁰⁶

Hall’s proposal provoked a vigorous discussion. Two delegates stated that although they had no objection, as a matter of their personal faith, to the suggestion that the Almighty “superintends all his works, and disposes the hearts of people to do good,” they did not see why it was “necessary that these sentiments should be inscribed in the Constitution,”²⁰⁷ because they “did not think we were here as a syna-

203. *Id.* The convention decided to strike the words “the State of” in the phrase “people of the State of California,” in order to appease those who expressed concern about the oddity of a territory declaring itself a state before admission to the union, but kept the language, drawn from New York’s preamble, expressing gratitude to God for freedom.

204. JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 165 (1851) [hereinafter INDIANA JOURNAL] (“We, the people of the State of Indiana, in order to establish justice, maintain public order, and perpetuate liberty, do ordain this Constitution”); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 851 (1850) [hereinafter INDIANA DEBATES].

205. INDIANA JOURNAL, *supra* note 204, at 318; INDIANA DEBATES, *supra* note 204, at 852.

We, the people of the State of Indiana, acknowledging the gracious providence of God, in bestowing upon us the great and manifold blessings of a Christian civilization; and, in particular, in vouchsafing to us a condition of society in which the social, political, and religious rights conferred by Him on mankind are recognized and respected; for the protection of these rights . . . and the establishment of justice, liberty, and the general well-being, do solemnly ordain and establish this Constitution.

INDIANA JOURNAL, *supra* note 204, at 318; INDIANA DEBATES, *supra* note 204, at 852.

206. INDIANA DEBATES, *supra* note 204, at 852.

207. *Id.* at 854 (comments of Mr. Morrison); *accord id.* at 855 (comments of Mr. Murray) (explaining that even though he had “no objection at all to the language of the substitute,”

gogue to make a special appeal to the Divines for their advice in this matter.”²⁰⁸ Several delegates then sought a compromise, proposing amendments to the committee’s original proposal to include more modest references to God; one such proposal would have expressed gratitude to God for freedom, and another for the right to choose a form of government.²⁰⁹ The convention rejected Mr. Hall’s proposal²¹⁰ and, after some debate over what exactly the preamble should express thanks for,²¹¹ adopted a modified version of the committee’s original proposal. The substitute expressed gratitude to God “for the free exercise of the right to choose our own form of government.”²¹²

The influence of the partisan dynamic that we described above was apparent at some of these state conventions, as well. For example, at the Ohio convention in 1850, the delegates initially considered language that would have stated the people’s trust in the “favor and protection of Almighty God,”²¹³ but eventually adopted language merely expressing gratitude to God for freedom.²¹⁴ Although it is not clear

because “it is what I acknowledge every night and morning, and profess in my life,” he was “unable to see any special necessity for introducing it into the amended Constitution”).

208. *Id.* at 855 (comments of Mr. Murray).

209. INDIANA JOURNAL, *supra* note 204, at 319–20; INDIANA DEBATES, *supra* note 204, at 851–55. Another delegate, perhaps sarcastically, proposed an amendment that would substitute language that did not refer to God: “[I]n Convention assembled, having been permitted, by the favor and patience of our constituents, to remain here so long, do ordain and establish this Constitution.” INDIANA JOURNAL, *supra* note 204, at 853 (comments of Mr. McLean).

210. INDIANA DEBATES, *supra* note 204, at 857 (noting that the vote was 72–43); INDIANA JOURNAL, *supra* note 204, at 321–22.

211. Compare INDIANA DEBATES, *supra* note 204, at 1974 (comments of Mr. Foster) (preferring language expressing gratitude to God for freedom, because he thought that “freedom” “implies the right to establish our own form of government” and is “a more appropriate and comprehensive phrase”), and *id.* at 1967 (comments of Mr. Niles) (arguing that an expression of gratitude for freedom is more accurate and elegant and “would convey a full recognition of the Divine Providence in human affairs, and of our obligations of gratitude for the blessings which are secured by good government”), with *id.* (comments of Mr. Owen) (noting that the delegates were assembled to choose their own form of government, and that “while we are about, in this solemn manner, to thank God for what we enjoy, we should make that expression of thankfulness correspond with the particular work in which we are engaged”).

212. IND. CONST. of 1851, pmb. (“To the end that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.”).

213. 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 70 (1851) [hereinafter 1 OHIO REPORT] (comments of Mr. Mitchell).

214. See OHIO CONST. of 1851, pmb. (“We, the people of the State of Ohio, grateful to

why the committee to which the delegates then referred the preamble dropped that language—an outbreak of cholera that led the delegates to adjourn and reassemble later in a different city also left some gaps in the convention records—there does not appear to have been any meaningful debate over the language referring to God in the preamble.²¹⁵ This is the case notwithstanding the receipt of a petition from citizens urging the delegates to acknowledge God, “his gracious Providence, and the obligations of his law as revealed in the Scriptures”²¹⁶ One possible explanation for the convention’s lack of enthusiasm for a preamble making more robust claims about the role of God is that a sizable majority of the delegates at the convention were members of the Democratic Party; only about one-third were Whigs.²¹⁷

In Minnesota, in contrast, members of the Republican Party, which inherited most former supporters of the Whig Party, were responsible for the language of the preamble expressing gratitude to God for civil and religious liberty.²¹⁸ Because of intense animosity between Democrats and Republicans in the territory, the parties met in separate conventions, with each seeking to draft a new constitution.²¹⁹ Each con-

Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this constitution.”).

215. There was modest controversy over a proposal to change the phrase “people of” to “the free white male citizens within,” 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 326 (1851) [hereinafter 2 OHIO REPORT] (referring to motion made by Mr. Woodbury), which the delegates rejected, but no apparent debate over the reference to God.

216. 1 OHIO REPORT, *supra* note 213, at 157; *see also* 2 OHIO REPORT, *supra* note 215 at 120. The petition also sought a clause in the Bill of Rights declaring that “as Christianity, morality, and knowledge, are essential to the good government and happiness of mankind, that therefore the church of God shall be protected, schools and means of instruction be encouraged by legislative provision, as far as is not inconsistent with the rights of conscience.” 1 OHIO REPORT, *supra* note 213, at 157.

217. *See* Barbara A. Terzian, *Ohio’s Constitutions: An Historical Perspective*, 51 CLEV. ST. L. REV. 357, 371 (2004) (noting that sixty-eight of the delegates were Democrats, while only forty-one were Whigs). Indeed, the Whigs in the legislature had opposed the calling of a convention, but they were outvoted by Democrats, who wanted a new constitution to reform the judiciary and to limit the legislature’s power to incur debt and charter corporations. *Id.* at 370. Ohio also voted for the Democratic candidates for President in 1848 (when Zachary Taylor, a Whig, won the Presidency) and 1852.

218. The preamble to Minnesota’s 1858 constitution, adopted upon admission to the union, provides, “We, the people of the State of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this constitution.” MINN. CONST. of 1858, pmbl.

219. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA, TO FORM A STATE CONSTITUTION PREPARATORY TO ITS ADMISSION INTO THE UNION AS A STATE 410 (1858) (discussing the possibility of having

vention drafted, considered, and adopted provisions independently of the other, and each convention viewed the opposition's convention as illegitimate.²²⁰ Late in the proceedings, the two parties agreed to form a conference committee, and that committee, apparently drawing on the work of both conventions, proposed one constitution that both groups approved.²²¹

Perhaps not surprisingly, the language in the preamble referring to God came from a provision considered and adopted at the Republicans' convention.²²² At the Democratic convention, in contrast, the delegates had approved a preamble that did not refer to God.²²³ Although there is no record of the deliberations of the conference committee, both conventions adopted a constitution with the preamble that the Republican convention had previously approved.²²⁴

There are also indications that the delegates at many of the conventions were aware of the language that other states had adopted in their preambles, and that several simply borrowed language from other states' recently adopted constitutions. As noted above, the delegates at the 1846 Wisconsin convention used language almost identical to New York's. At the 1850 Indiana convention, a member of the committee that drafted the preamble made clear that the committee had considered the preambles in other states.²²⁵ At the 1850 Maryland convention, the delegate who proposed the specific language referring to God

"two separate and distinct Constitutions").

220. *Id.*

221. *Id.* at 410-13, 504.

222. *Id.* at 78. *See also id.* at 504 (adopting the proposed preamble). There was brief debate over the proposal at the Republican convention. One delegate moved to delete the reference to God, *id.* at 88 (motion of Mr. Galbraith), arguing that although "[t]here is no man here but recognizes a Divine Providence . . . why put that in this Constitution[?]" *Id.* at 88-99. But two other delegates spoke against the amendment, arguing that

the people of the Territory recognize a higher power than the law of the land; and the will of God, upon which all just law is based, and his kindness, mercy and goodness to us, in permitting us to enjoy our civil and religious privileges, should be recognized by us in the very commencement of our work.

Id. at 89 (comments of Mr. Hayden); *see also id.* (comments of Mr. North) (same).

223. THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 203 (1857) ("We, the People of Minnesota, in order to form a State Government, and to secure and perpetuate the blessings of Liberty, do ordain and establish this Constitution."). There was extensive debate over the proposal, but the discussion focused on whether the preamble should define the boundaries of the new state. *Id.* at 204-11.

224. *Id.* at 604-16.

225. INDIANA DEBATES, *supra* note 204, at 855 (comments of Mr. Murray).

that the delegates ultimately approved explained that his proposed language was “similar to that which had been adopted in seven or eight of the Constitutions of the States.”²²⁶ And at the 1849 California convention, the committee charged with drafting the preamble explained that its proposal borrowed from New York’s 1846 constitution,²²⁷ though some delegates treated this fact alone as a reason to oppose it.²²⁸

Not every state that adopted a new constitution between 1840 and 1860 included a preamble that referred to God. In all, six states collectively adopted seven constitutions during this era that did not do so. (Louisiana adopted two constitutions during this period.) There was no substantial controversy at the conventions in those states over the proposals to adopt preambles that did not mention God, even though there are indications that the delegates in at least some of the states were aware of recently adopted preambles in other states referring to God. For example, although a delegate at the 1849 Kentucky convention proposed a preamble that referred to God in language borrowed from the Iowa constitution,²²⁹ the committee charged with drafting the preamble later proposed language that did not mention God.²³⁰ There was no apparent debate over the proposal, which the convention ultimately adopted. The delegates to the Michigan convention in 1850 spent almost no time considering the preamble. One delegate proposed a preamble based on the federal Constitution’s preamble,²³¹ but

226. MARYLAND DEBATES, *supra* note 191, at 238 (comments of Mr. Randall).

227. See CALIFORNIA DEBATES, *supra* note 195, at 379 (comments of Mr. Norton).

228. See *id.* (comments of Mr. Shannon, who called the New York preamble “the most butt-ended one that could be found”); *id.* (comments of Mr. McDougal) (expressing hope that the convention would have “originality enough about it to form a preamble of its own, without referring to New York, or any other State. I desire to see in this Constitution a few lines at least of our own manufacture”); *id.* at 379–80 (comments of Mr. McCarver) (“The very fact that the proposition of the Committee is from the Constitution of New York would induce me to reject it.”).

229. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 41 (1849) (proposal of Mr. Hargis).

230. *Id.* at 168 (describing report by Mr. McHenry of the work of the committee on Miscellaneous Provisions, including the preamble, which provided: “We, the representatives of the people of the state of Kentucky, in convention assembled, to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this constitution for its government.”); see also *id.* at 356 (report of the Committee on Miscellaneous Provisions).

231. See REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 236 (1850) (proposal of Mr. Church).

he withdrew the resolution when informed that the committee on phraseology would draft language for the preamble.²³² That committee eventually proposed a simple preamble that did not mention God — “The People of the State of Michigan do ordain this Constitution” — and the convention adopted it without any apparent debate.²³³ There similarly was no meaningful debate over the preamble to Louisiana’s 1852 constitution, which provides, “We, the people of the State of Louisiana, do ordain and establish this Constitution,”²³⁴ or the preamble to the Oregon’s 1859 constitution, which provides, “We, the people of the State of Oregon, to the end that justice be established, or maintained, and liberty perpetuated, do ordain this constitution.”²³⁵

Whereas in 1840 the states with constitutions referring to God in the preamble were the exceptions, by 1860 almost half of the states (sixteen out of thirty-three) had adopted constitutions with preambles referring to God. The trend was geographically diverse, with the exception of the states in the South. On the eve of the Civil War, Texas was the only state of those that would join the Confederacy that referred to God in its preamble.²³⁶

It is perhaps surprising, from our vantage point today, to find that the states in the South were the last to embrace the practice of invoking God in their constitutions’ preambles. There are three reasons why the trend was slow to reach the South. First, between 1840 and 1860, a time when references to God in preambles were becoming the norm, only three future confederate states adopted new constitutions.²³⁷

Second, as we noted above, the Second Great Awakening had much more limited, and quite different, meaning in the South than it did in the North and the Midwest.²³⁸ Whereas the Puritan emphasis

232. *Id.*

233. *Id.* at 888; JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 460 (1850).

234. A motion to create a special committee to draft and report a preamble and bill of rights failed, as did a motion to postpone further consideration of the preamble. JOURNAL OF THE CONVENTION TO FORM A NEW CONSTITUTION FOR THE STATE OF LOUISIANA 12 (1852).

235. OR. CONST. of 1857, pmb1.

236. TEX. CONST. of 1861, pmb1.

237. Texas’s 1845 constitution, adopted upon admission, referred to God in language apparently borrowed from New York’s 1821 constitution. Florida’s original 1845 constitution and Louisiana’s 1845 and 1852 constitutions, in contrast, did not refer to God.

238. GOEN, *supra* note 121, at 68–107 (detailing the divisions within Presbyterian, Methodist, and Baptist polities that led to North-South splits, generally driven by Southern rejection of reformist – and particularly abolitionist – ideas emerging from the Second Great Awakening); M'CLOUGHLIN, *supra* note 122, at 137–38.

on a holy community was the hallmark of the movement in the North and the Midwest, Southern evangelicals tended to reject this Puritan inheritance.²³⁹ The evangelical appropriation of this Puritan idea treated the entire nation as the holy community. Largely because of the debate over slavery and the subordinate question of state sovereignty, many in the South tended to reject the conception of the nation as a unified people.²⁴⁰ In addition, theologians and preachers in the South adopted a theology known as the “Spirituality of the Church,” in which the church restricts its preaching to the individual’s relationship with God.²⁴¹

Third and related, as we have explained, Whigs often were the driving force behind proposals to invoke God in state constitutions. That party, however, and even more so its Republican successors, had less influence in the South because of the close association between evangelical activism and abolitionism.²⁴²

Once the Civil War began, however, the trend to include language about God in state constitution preambles began to spread to the South.

D. 1861–1877

The trend gained a firmer foothold in the South when the convention that adopted the constitution of the Confederate States of America adopted a reference to God in its preamble, which “invok[ed] the favor and guidance of Almighty God.”²⁴³ In February 1861, shortly after the

239. MCKENNA, *supra* note 52, at 86–87.

240. *See id.* at 167.

241. *See* ANNE C. LOVELAND, *SOUTHERN EVANGELICALS AND THE SOCIAL ORDER 1800–1860*, at 96–97 (1980).

242. *See, e.g.,* Cook, *supra* note 146, at 97.

Many of the upcountry southerners who migrated to Iowa in the late 1830s and 1840s were also Democrats, principally because they had opposed the dominance of large Whig slaveholders in states such as Tennessee and Virginia. Many of these people were Baptists and Methodists, and were naturally suspicious of the more Yankeeified denominations that were at the forefront of moral reform in the antebellum period, particularly Congregationalists and Presbyterians.

Id.

243. We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity invoking the favor and guidance of Almighty God do ordain and establish this Constitution for the Confederate States of America.

first states seceded from the union, delegates from those states met at a convention in Montgomery, Alabama.²⁴⁴ The delegates quickly agreed to create a provisional constitution for the Confederate States of America, which they did only four days after the opening of the convention.²⁴⁵ The preamble to the provisional constitution provided:

We, the Deputies of the Sovereign and Independent States of South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana, invoking the favor of Almighty God, do hereby, in behalf of these States, ordain and establish this Constitution for the Provisional Government of the same: to continue one year from the inauguration of the President, or until a permanent Constitution or Confederation between the said States shall be put in operation, whichsoever shall first occur.²⁴⁶

The initial draft of the provisional constitution that the delegates considered began by stating that it was “In the name of Almighty God,” followed by a preamble that did not mention God.²⁴⁷ The delegates, however, voted to remove that introductory reference.²⁴⁸ In response, William P. Chilton, one of the few delegates who had been a member of the Whig party,²⁴⁹ proposed adding a strongly evangelical claim to the preamble: “In the name of the Almighty, who is the God of the Bible, and the source of all rightful authority and rule.”²⁵⁰ Another delegate moved to amend Chilton’s proposal to state merely, as an introductory phrase, “Invoking the favor of Almighty God,” and the convention approved the amendment.²⁵¹ The convention then rejected a proposal to adopt a somewhat long-winded preamble that would have said that the states of the Confederacy, “looking to the

CONFEDERATE STATES OF AMERICA CONST. of 1861, pmb1.

244. 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861–1865, S. DOC. NO. 234, at 7 (2d Sess. 1904) [hereinafter CONFEDERATE JOURNAL]. The convention included delegates from South Carolina, Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, the seven states that had seceded as of February 1861. *Id.* at 95.

245. *See id.* at 7 (stating that the convention began February 4, 1861); CONST. OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA of 1861 (noting that the Constitution of the Confederate States of America was created February 8, 1861).

246. *See* CONST. OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA of 1861.

247. *See* CONFEDERATE JOURNAL, *supra* note 244, at 25–26.

248. *Id.* at 32.

249. *Id.* Chilton, a former Chief Justice of the Alabama Supreme Court, was the son of a Baptist minister.

250. *Id.* at 32.

251. *Id.* at 33. (proposal of Mr. Harrison).

guidance and protection of Almighty God," created their republic and agreed upon the provisional constitution.²⁵² Walker Brooke, a former Whig Senator, finally "moved that the words beginning the preamble" – that is, the language "Invoking the favor of Almighty God" – "be transposed" so as to create the version of the preamble that the delegates adopted.²⁵³

The convention built upon the text of the provisional constitution in crafting the Confederacy's "permanent" constitution. The version that the Committee on the Permanent Constitution drafted and presented to the delegates recited the constitution's objectives, "to which ends we invoke the favor and guidance of Almighty God."²⁵⁴ (This was a change from the language of the provisional constitution, which invoked only God's favor.) After some debate over the proper subjects on whose behalf the constitution would be adopted – the people, the Confederate States of America, or the states listed individually²⁵⁵ – a delegate proposed streamlining the clause referring to God so that it would read, "invoking the favor and guidance of Almighty God."²⁵⁶ The delegates ultimately adopted that version of the preamble.²⁵⁷ The final version of the preamble provided,

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity invoking the favor and guidance of Almighty God do ordain and establish this Constitution for the Confederate States of America.²⁵⁸

The records of the debates at the Montgomery Convention are not comprehensive, but from the information available we can offer some hypotheses about why the southern delegates finally decided to adopt preamble language referring to God. First, the invocation of God does not reflect a radically different understanding of the relationship between government and religion. The delegates at the convention did not impose any religious test for office, and they adopted wholesale

252. *See id.* (proposal of Mr. Cobb, as amended by Mr. Smith).

253. *Id.* at 33.

254. *Id.* at 851.

255. *Id.* at 858–59.

256. *Id.* at 859.

257. *Id.* at 895–96.

258. *See* CONFEDERATE STATES OF AMERICA CONST. of 1861, pmb1.

the Establishment and Free Exercise Clauses from the federal Constitution.²⁵⁹ Second, it is difficult to resist the conclusion that, given the nature of their undertaking, the delegates likely felt the need to seek as much aid and guidance as they could get, from divine sources or otherwise. Third, it appears that the general pattern that we have described for other parts of the country – Whig delegates, more likely infused with the fervor of the Second Great Awakening, led the charge to include language invoking to God – was present at the Montgomery Convention, as well. Of those whose political affiliations we could identify at the convention, there were more than three times as many Democrats as there were former Whigs, which is not surprising given political affiliations in the South at the time.²⁶⁰ Nevertheless, although we could identify only six Whigs (or former Whigs) at the convention, two of the delegates who played central roles in proposing the language referring to God in the provisional constitution, which became the language of the permanent constitution, were Whigs (or former Whigs).

Although the Confederate constitution brought the trend to the South, most of the individual states in the confederacy did not immediately adopt preambles referring to God. This is true even though the era including the Civil War and Reconstruction was a time of prolific constitution-making, particularly in the South. Between 1861 and 1877, the eleven states of the Confederacy (Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, Texas, and Tennessee) collectively adopted twenty-eight constitutions. Alabama, Arkansas, and Texas adopted four each during this era; South Carolina, Florida, Georgia, and Louisiana adopted three each during this era; and North Carolina, Mississippi, Virginia, and Tennessee adopted one each, all after the end of the Civil War. Seven of the eleven Confederate states adopted new constitutions upon secession;²⁶¹ seven adopted constitutions before or at the end of the

259. See CONFEDERATE STATES OF AMERICA CONST. of 1861, art. I, § 9, cl. 12; James E. Pfander, *So Help Me God: Religion and Presidential Oath-Taking*, 16 CONST. COMMENT. 549, 551 n.7 (1999).

260. See CONFEDERATE JOURNAL, *supra* note 244, at 896, 908–09. There were more than forty delegates at the convention. We are confident that eighteen were Democrats and six were (or had previously been) Whigs. We were unable to determine the political affiliation of the remaining nineteen delegates.

261. South Carolina, Alabama, Florida, Arkansas, Texas, Georgia, and Louisiana adopted constitutions upon secession. The four confederate states that did not adopt constitutions upon secession were Virginia, North Carolina, Mississippi, and Tennessee.

war;²⁶² all eleven adopted new constitutions between 1868 and 1870; and four adopted new constitutions between 1873 and 1877.²⁶³

To be sure, Alabama quickly followed the approach of the Confederate constitution; the preamble to its 1861 secession constitution borrowed heavily from that of the Confederate constitution, including taking verbatim the clause “invoking the favor and guidance of Almighty God.”²⁶⁴ Texas’s 1861 secession constitution also referred to God; but this was not surprising, as its prior constitution had already done so (albeit in slightly different language).²⁶⁵ Yet five other confederate states—South Carolina, Florida, Arkansas, Georgia, and Louisiana—adopted new constitutions upon secession (and, in the case of Arkansas and Louisiana, during the war, as well)²⁶⁶ that did not refer to God in the preamble.

Georgia did not adopt a constitution referring to God in the preamble until 1865,²⁶⁷ and South Carolina,²⁶⁸ Arkansas,²⁶⁹ North Caroli-

262. ALA. CONST. of 1865; ARK. CONST. of 1864; FLA. CONST. of 1865; GA. CONST. of 1865; LA. CONST. of 1864; S.C. CONST. of 1865; TEX. CONST. of 1866.

263. ARK. CONST. of 1874; ALA. CONST. of 1875; TEX. CONST. of 1876; GA. CONST. of 1877.

264. We, the People of the State of Alabama, having separated ourselves from the Government known as the United States of America, and being now by our representatives in convention assembled, and acting in our sovereign and independent character; in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish the following Constitution and form of Government for the State of Alabama

ALA. CONST. of 1861, pmbl.

Alabama’s 1865 and 1868 constitutions did not meaningfully depart from the preamble to the 1861 constitution, and the 1875 constitution both expressed gratitude to God for the right to form a new constitution and again invoked his favor and guidance.

265. Texas’s 1861 preamble provided: “We, the people of the State of Texas, acknowledging, with gratitude, the grace of God, in permitting us to make choice of our form of government, do ordain and establish this Constitution.” TEX. CONST. of 1861, pmbl. Its 1845 constitution, in contrast, expressed gratitude for the “grace and beneficence” of God. Texas adopted constitutions in 1866 and 1869 that made only a slight change, dropping the word beneficence but continuing to express gratitude for the grace of God. In 1876, Texas adopted a constitution that “invok[ed] the blessings of [] God.” See TEX. CONST. of 1876, pmbl.

266. In addition to their 1861 secession constitutions, Arkansas and Louisiana both adopted constitutions in 1864.

267. Georgia’s 1861 secession constitution did not refer to God. The preamble to its 1865 readmission constitution (its fifth constitution since 1776) “acknowledg[ed] and invoc[ed] the guidance” of God. GA. CONST. of 1865, pmbl. The 1868 constitution retained this language. In 1877, Georgia adopted a new constitution with a preamble stating that the people were “relying upon the protection and guidance of Almighty God” GA. CONST. of 1877, pmbl.

na,²⁷⁰ Mississippi,²⁷¹ and Florida²⁷² did not do so until 1868. Virginia first adopted a constitution referring to God in the preamble in 1870 (though it would eventually abandon the reference);²⁷³ Louisiana did not adopt a constitution mentioning God in the preamble until 1879;²⁷⁴ and Tennessee (which adopted a constitution in 1870) never did.²⁷⁵

268. The preambles to South Carolina's 1861 secession constitution and the 1865 readmission constitutions did not refer to God. The state first referred to God in the preamble to its 1868 constitution, its third constitution of this era (and sixth for the state since 1776); the preamble expresses gratitude to "Almighty God" and "implor[es] the direction of the Great Legislator of the Universe." S.C. CONST. of 1868, pmbl.

269. The preambles to Arkansas's 1861 and 1864 constitutions did not refer to God. The state first adopted such a reference in the preamble to its 1868 constitution, which expressed gratitude "to God for our civil and religious liberty." ARK. CONST. of 1868, pmbl. The preamble to the 1874 constitution used the same language by expressing gratitude "to Almighty God for the privilege of choosing our own form of Government [and] for our civil and religious liberty." ARK. CONST. of 1874, pmbl.

270. The preamble to North Carolina's 1868 constitution (its first constitution since its 1776 constitution) expressed gratitude "to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union, and the existence of our civil, political and religious liberties, and [it acknowledged] our dependence upon Him, for the continuance of those blessings . . ." N.C. CONST. of 1868, pmbl.

271. The preamble to Mississippi's 1868 constitution (its first since its 1832 constitution) expressed gratitude "to Almighty God for the free exercise of the right to choose our own form of government." MISS. CONST. of 1868, pmbl.

272. The preambles to Florida's 1861 and 1865 constitutions did not refer to God. The state first adopted a reference to God in the preamble to its 1868 constitution, which expressed gratitude "to Almighty God for our freedom." FLA. CONST. of 1868, pmbl.

273. The preamble to Virginia's 1870 constitution "invok[ed] the favor and guidance of Almighty God." VA. CONST. of 1870, pmbl. Virginia's prior three constitutions had not referred to God. Although the 1902 constitution also contained a reference to God, the 1971 (and current) constitution did not. In addition, a convention in 1864 of delegates from parts of Virginia that were within union lines and that were not part of West Virginia produced a Constitution that, among other things, abolished slavery, but it was never submitted to the people for ratification. It borrowed the opening from the 1830 constitution, which did not refer to God. *See* VA. CONST. of 1864.

274. None of the three constitutions that Louisiana adopted during this era—in 1861, 1864, and 1868—referred to God. Louisiana did not adopt a constitution with a preamble referring to God until 1879, when (in its seventh constitution since joining the union) its preamble "acknowledg[ed] and invok[ed] the guidance of Almighty God, the author of all good government." LA. CONST. of 1879, pmbl. In 1898, the state adopted yet another constitution with a preamble that expressed gratitude to God for "civil, political and religious liberties."

275. Tennessee's 1870 constitution began with several "whereas" clauses and then stated,

[W]e, the delegates and representatives of the people of the State of Tennessee, duly elected, and in convention assembled, in pursuance of said Act of Assembly, have ordained and established the following Constitution and form of government for this State, which we recommend to the people of Tennessee for their ratification . . .

When they eventually adopted preambles referring to God, the southern states tended to use one of two basic verbal formulations, though some of the states had difficulty settling on one approach rather than the other.²⁷⁶ A few used the version of Type 1 language that had become commonplace in other parts of the country, expressing gratitude to God for liberty or the right to self-government.²⁷⁷ The majority, however, followed the lead of the Confederate constitution by invoking God's "favor,"²⁷⁸ "guidance,"²⁷⁹ "protection,"²⁸⁰ or "direction."²⁸¹ Georgia's 1877 preamble was typical: "To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen, and transmit to pos-

TENN. CONST. of 1870, pmbl.

276. Although Texas and Mississippi adopted constitutions with Type 1 preambles during this era—Texas adopted three such constitutions during this era—they both later adopted constitutions with Type 2 preambles. See MISS. CONST. of 1890, pmbl.; TEX. CONST. of 1876, pmbl. Louisiana later adopted a constitution with a Type 2 preamble, although it then replaced that constitution with one that used Type 1 language. South Carolina replaced its Type 2 preamble in 1896 with a Type 1 preamble. Virginia later adopted a constitution that eliminated the preamble and thus the reference to God.

277. See ARK. CONST. of 1874, pmbl. ("We, the People of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of Government; for our civil and religious liberty; and desiring to perpetuate its blessings, and secure the same to our selves and posterity; do ordain and establish this Constitution."); FLA. CONST. of 1868, pmbl. ("We the people . . . grateful to Almighty God for our freedom, . . . do establish this constitution."); MISS. CONST. of 1868, pmbl. ("[W]e, the people . . . grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution."); TEX. CONST. of 1861, pmbl. ("We, the people . . . acknowledging, with gratitude, the grace of God, in permitting us to make choice of our form of government, do ordain . . ."). Texas adopted three such constitutions during this era—consistent with its 1845 constitution, which expressed gratitude for God's "grace and beneficence"—and Arkansas adopted two.

278. See ALA. CONST. of 1861, pmbl. ("invoking the favor and guidance of Almighty God"); ALA. CONST. of 1865, pmbl. (same); ALA. CONST. of 1868, mbl. (same); VA. CONST. of 1870, pmbl. (same); ALA. CONST. of 1875, pmbl. ("invoking His favor and guidance").

279. See GA. CONST. of 1877, pmbl. ("relying upon the protection and guidance of Almighty God"); GA. CONST. of 1865, pmbl. ("acknowledging and invoking the guidance of Almighty God, the author of all good government"); ALA. CONST. of 1861, pmbl. ("invoking the favor and guidance of Almighty God"); VA. CONST. of 1870, pmbl. (same); ALA. CONST. of 1875, pmbl. ("invoking His favor and guidance").

280. See GA. CONST. of 1877, pmbl. ("relying upon the protection and guidance of Almighty God").

281. S.C. CONST. of 1868, pmbl. ("imploring the direction of the Great Legislator of the Universe"). Two of the southern constitutions adopted between 1861 and 1877 instead used language similar to that in the Type 2 preambles adopted in the 1840s. See N.C. CONST. of 1868, pmbl. ("acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity"); TEX. CONST. of 1876, pmbl. ("Humbly invoking the blessing of Almighty God").

terity the enjoyment of liberty, we, the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution[.]”²⁸² By the end of Reconstruction, only two former confederate states (Louisiana and Tennessee) had not adopted constitutions that referred to God in the preambles,²⁸³ and one of them (Louisiana) did so in 1879.²⁸⁴

It appears that most of the southern states in this era borrowed preamble language from the Confederate constitution or from other states’ constitutions, usually with little attention to the particular character of the religious claims entailed by the chosen language. As with the constitutions adopted in this era in other parts of the country, there is little that one can infer at this point from the choice of Type 1 or Type 2 preambles. The important point, for present purposes, is that the practice of invoking God in the preamble eventually became the norm in the South, just as it had become the norm elsewhere.

The southern commitment to the idea of the “Spirituality of the Church” did not waver during this era.²⁸⁵ Instead, the southern states’ decision to adopt the practice of referring to God in their preambles is explained, we believe, by the increasing acceptance in the South of the idea that southerners are members of one national, holy community. Whereas many southerners had earlier rejected this Puritan idea, the end of the debate over slavery—and the related debate over uniformity—softened southern resistance to the notion that its people were part of a broader national community. This also helps to explain why most of the states of the confederacy did not adopt preambles with references to God until after the Civil War had ended.²⁸⁶

The pace of constitution-making outside of the South was considerably slower in this era. Nine states that were not part of the confederacy—including five states that were admitted to the union between 1861 and 1877—collectively adopted thirteen constitutions during this era.²⁸⁷ Four of the five newly admitted states adopted constitutions

282. GA. CONST. of 1877, pmb1.

283. Louisiana adopted three such constitutions during this era, none of which mentioned God in the preamble.

284. In 1898, Louisiana adopted a constitution with a Type 1 preamble, which it retains (in slightly modified form) today. Virginia later adopted a constitution that omitted the preamble and thus the reference to God.

285. See *supra* notes 237–38 and accompanying text.

286. See *supra* notes 257–62 and accompanying text.

287. Maryland, Missouri, West Virginia, and Nebraska adopted two constitutions each during this era.

with preambles referring to God.²⁸⁸ West Virginia, the fifth new state, did not include a reference to God in its original constitution.²⁸⁹ It was the only state that had not been part of the confederacy that adopted a constitution in this era that did not refer to God in the preamble.²⁹⁰ Two states that already had references to God in their preambles adopted new constitutions that contained similar language.²⁹¹ In addition, two states that previously had adopted constitutions that did not refer to God adopted preambles that mentioned God.²⁹²

As was the case in the South, it appears that in this era the states in other parts of the country tended simply to borrow language from their prior constitutions or other states' constitutions without much regard to the implications of the particular references to God. But at least in the case of Pennsylvania, the particular language adopted was significant because it represented a compromise between those who wanted the constitution to declare the sovereignty of Jesus Christ and those who preferred no reference to God at all.²⁹³

Pennsylvania's 1874 constitution replaced an earlier constitution that did not mention God in the preamble. The 1874 preamble was similar to the preambles that many southern states adopted during this

288. COLO. CONST. of 1876, pmb.; KAN. CONST. of 1861, pmb.; NEB. CONST. of 1866, pmb.; NEV. CONST. of 1864, pmb.

289. W. VA. CONST. of 1863, pmb.

290. West Virginia adopted two constitutions during this era, but neither referred to God. Early in the proceedings at the 1872 West Virginia convention, one of the delegates proposed a preamble with Type 2 language. See JOURNAL OF CONSTITUTIONAL CONVENTION ASSEMBLED AT CHARLESTON, WEST VIRGINIA, JANUARY 16, 1872, at 28 (1872) [hereinafter WEST VIRGINIA JOURNAL] (comments of Mr. Hagans) ("We the people of the State of West Virginia, grateful to Almighty God for our freedom, in order to secure its blessings, and invoking His wisdom for future guidance, do establish this Constitution."). The journal of the proceedings does not include much detail, but the committee charged with drafting language for the Bill of Rights did not propose a preamble, but rather proposed introductory language (for the first section of the first article) that did not refer to God. See Convention Doc. No. 24, reprinted in WEST VIRGINIA JOURNAL, *supra* note 290, at 419 ("The State of West Virginia is, and shall remain one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land."). The convention ultimately adopted the committee's proposed language. See W. VA. CONST. of 1872, art. I, § 1.

291. Maryland adopted constitutions in 1864 and 1867 with preambles that used the reference to God that it had used in its 1851 constitution. Illinois adopted a constitution in 1870 with a preamble that was identical to its 1848 constitution.

292. Missouri's original constitution, adopted in 1821, did not refer to God, but both constitutions that Missouri adopted between 1861 and 1877 referred to God. Pennsylvania, which had adopted constitutions in 1790 and 1838 that did not refer to God in the preamble, adopted a constitution in 1874 with such a reference.

293. PA. CONST. of 1874, pmb.

era; it not only expressed gratitude to God for liberty, but also “humbly invok[ed] His guidance.”²⁹⁴ The original proposal was similar to the Type 2 preambles that Rhode Island, New Jersey, and Illinois adopted in the 1840s.²⁹⁵ The Committee on the Declaration of Rights then modified the proposal to reflect the demands of the many petitions “asking the Convention to embody in the Constitution an acknowledgment of Almighty God as the ultimate authority in civil government, of the Lord Jesus Christ as the Ruler of Nations, and of the Bible as the supreme standard of righteous law.”²⁹⁶ The revised proposal provided, “We, the people of the Commonwealth of Pennsylvania, recognizing the sovereignty of God, and humbly invoking His guidance in our future destiny, ordain and establish this Constitution for its government[.]”²⁹⁷

294. *Id.* (“We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.”).

295. Resolved, That we, the people of the State of Pennsylvania, grateful to Almighty God, the Creator of the Universe, for the civil, religious and political liberty which has been so long vouchsafed us to enjoy, and looking to the same source for blessings upon our endeavors to secure and transmit the same to succeeding generations, do ordain and establish this Constitution for the State of Pennsylvania.

See 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 92 (1873) [hereinafter 1 PENNSYLVANIA DEBATES]; accord 1 JOURNAL OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 75 (1873) [hereinafter 1 PENNSYLVANIA JOURNAL].

296. 1 PENNSYLVANIA JOURNAL, *supra* note 295, at 499 (comments of Mr. MacConnell) (acknowledging the petitions and noting that the committee’s proposed preamble contained an “acknowledgment of Almighty God, and a humble invocation of His guidance in our future destiny,” and thus requesting that “the Committee on the Declaration of Rights be discharged from the further consideration of the subject”). During the Convention, the delegates received many petitions “asking for the recognition in the Constitution of Almighty God and the obligation of the Christian religion.” 6 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 588 (1873) [hereinafter 6 PENNSYLVANIA DEBATES]. See, e.g., 3 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 42 (1873) [hereinafter 3 PENNSYLVANIA DEBATES]; 5 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 3, 50, 142, 202 (1873) [hereinafter 5 PENNSYLVANIA DEBATES]; 1 PENNSYLVANIA JOURNAL, *supra* note 295, at 385, 395, 438, 443, 456–58, 481, 484, 487, 488, 506, 512, 517, 523, 541, 580, 658. See also William Bentley Ball, *The Religion Clauses of the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 709, 719 (1994) (noting that “a widespread campaign by all or most counties of the Commonwealth petitioned the convention to adopt a provision in the constitution recognizing God as ‘the foundation of the State’”) (citing 3 PENNSYLVANIA DEBATES, *supra* note 296, at 228).

297. 1 PENNSYLVANIA JOURNAL, *supra* note 295, at 424, 539; accord 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 412 (1873) [hereinafter 2 PENNSYLVANIA DEBATES]. When Mr. MacConnell presented the Committee’s report about its proposed language, he reported that another delegate (Colonel Hopkins) had been the

There was considerable debate over the proposed language. Opponents of the reference to God—and in particular the language recognizing “the sovereignty of God”—contended that such a reference had no place in the state’s constitution, both because it was not “in very good taste”²⁹⁸ and because it was inappropriate effectively to submit for a popular vote the question of the existence of God.²⁹⁹ They also invoked the principle of the separation of church and state,³⁰⁰ arguing both that the delegates should protect religion from the corrupting influence of government³⁰¹ and that it was a short step from this form of recognition of God to state action preferring one sect or set of beliefs (and thus one set of citizens) over all others.³⁰² Indeed, some of the opponents of the reference to God explicitly noted that the petitions that the committee sought to accommodate asked the convention not only to acknowledge God but “also make an acknowledgment of Jesus Christ and of the Scriptures as the supreme law of the land, to which all other laws must conform.”³⁰³ Finally, opponents of the refer-

chair of the committee, but had died before its deliberations had been completed. Colonel Hopkins had proposed the language about humbly invoking the guidance of God, and the committee concluded that it should be worked in to the preamble as a tribute to Col. Hopkins, as his “last public act.” 4 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 647 (1873) [hereinafter 4 PENNSYLVANIA DEBATES].

298. 4 PENNSYLVANIA DEBATES, *supra* note 297, at 758–59 (comments of Charles Buckalew) (stating that the proposal “reads very much as if we were paying a compliment to the Supreme Being by recognizing His existence”).

299. *Id.* at 759–60 (comments of Mr. Broomall) (stating that the convention should not be willing “to submit to a majority of ballots the question of the existence and attributes or the Deity”); *id.* at 763 (comments of Mr. Campbell) (“We all either believe in God, or should do so, in my opinion; and if we believe in God and in the religion He has revealed to us, there is no necessity whatever of declaring that belief in a State Constitution.”).

300. *Id.* at 759–60 (comments of Mr. Broomall) (“It was for this reason, and after the experience of centuries, that our forefathers divorced forever all church and State, and suffered religion to stand where it should stand, upon the consciences and the convictions of men!”).

301. *Id.* (comments of Mr. Broomall) (“Christianity asks no aid from human governments; that religion can stand a great deal of crushing out without being injured, but when it is taken to the arms of he civil power, it falls degraded and dishonored.”).

302. *See id.* at 763 (comments of John Campbell) (arguing that the reference to God would be “the first step . . . toward an attempt to insert in the Constitution of the State of Pennsylvania something like sectarianism or a State religion.”);

If you may today disfranchise any man because he does not believe in the existence of a God, tomorrow you may disfranchise a man because he does not believe in the plenary inspiration of the Scriptures, and the next day because he does not believe in the deity of Jesus Christ. This is the logical conclusion to which this kind of legislation brings us.

Id. at 767–68 (comments of David Craig).

303. *Id.* at 767–68 (comments of David Craig).

ence to God noted that the people of the state had “prospered” under the preamble to the state’s 1838 constitution, which did not refer to God, and that the prior constitution’s silence on the question had not led any “Christian [to doubt] the existence of a God or the divinity of Christ.”³⁰⁴

Supporters of the committee’s proposed language referring to God advanced several arguments. First, they noted that the people of the state, as evidenced by the many petitions the convention received, strongly desired such a reference in the constitution.³⁰⁵ Second, they asserted that the language did not invoke a sectarian conception of God, but rather simply “that God who made you and who made me.”³⁰⁶ Third, supporters noted that many other states’ constitutions referred to God in what they understood to be a similar fashion.³⁰⁷ Fourth, they contended that an acknowledgment of the existence of God—and God’s power, “which is behind the State and above the State”—might “check, in some degree, the tendency to corruption and the prevalent irreligion of the day.”³⁰⁸

Charles Buckalew, a former U.S. Senator who was troubled by the theological content of the committee’s proposal, moved to replace the reference with Type 1 language expressing gratitude “to Almighty God for the blessing of civil and religious liberty.”³⁰⁹ Another delegate moved to amend Buckalew’s amendment to add the phrase “and

304. *Id.* at 763 (comments of John Campbell).

305. *See id.* at 765–66 (comments of Mr. Curry) (“[S]hall we adopt this principle and thereby answer the prayers of tens of thousands of our constituents who through the churches have asked us time and again, by their petitions, to recognize God in this preamble[?]”); *id.* at 766–67 (comments of Mr. T. H. B. Patterson) (stating that the language was designed to reflect the wishes of constituents who had submitted petitions).

306. *Id.* at 765–66 (comments of Mr. Curry); *accord id.* at 766–67 (comments of Mr. Patterson) (arguing that the proposed language “is not a recognition of any religion under heaven specifically”).

307. *Id.* at 766–67 (comments of Mr. T. H. B. Patterson) (“Every State Constitution, with the exception of four or five, or at least thirty of the State Constitutions, contain this recognition. Every Constitutional Convention that has met to reorganize and revise a State Constitution in this broad land has made this recognition if it was not already contained in the Constitution of the State.”).

308. *Id.*

309. *Id.* at 758–59. It is clear from his comments, however, that Buckalew had no objection to a Type 2 preamble. He praised the content of Illinois’s 1848 preamble but lamented that it was too long, *id.*, and stated in response to a question that he had “no objection to invoking [God’s] favor for the future.” *Id.* at 759. Buckalew thus seemed primarily concerned with the language declaring the sovereignty of God.

humbly invoking His guidance,³¹⁰ effectively converting the proposal into a Type 2 preamble. The convention approved the amendment³¹¹ and then engaged in further debate over the proposal as amended. One delegate moved to strike out the amended proposal and to adopt the preamble to the 1838 constitution, which did not mention God;³¹² later, supporters of the petition movement again proposed language to “acknowledge[] the sovereignty of the deity as Ruler of the Universe” and to invoke God’s “favor” as well as God’s guidance.³¹³ The convention rejected both proposals,³¹⁴ viewing the ultimately adopted language as a fair compromise between the “fastidious churchmen of the Convention,” who supported an assertion of God’s sovereignty on Earth, and the “Quakers,” who preferred no reference to God at all.³¹⁵

The debates at the 1873 Pennsylvania convention reveal the influ-

310. *Id.* at 761 (comments of Mr. Lamberton). The amended proposal provided: “The people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution for its government.” *Id.* It thus deleted the reference to God’s “sovereignty” and the invocation of God’s guidance “in our future destiny.” *Id.* at 770.

311. *Id.*

312. *Id.* (comments of Mr. Hanna).

313. 5 PENNSYLVANIA DEBATES, *supra* note 296, at 633–34 (comments of Mr. Purviance) (explaining that his proposed amendments would be “more fully expressive of the desire of the people as shown by the petitions which have been presented to this body”); *see also* 7 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 251–52 (1873) [hereinafter 7 PENNSYLVANIA DEBATES] (comments of Mr. Purviance) (reminding the delegates of the petitions and stating that his amendment “is a recognition of it” and that “we should also express our recognition or acknowledgment of His sovereignty and of His supreme rule over this universe”).

314. 4 PENNSYLVANIA DEBATES *supra* note 297, at 770; 5 PENNSYLVANIA DEBATES, *supra* note 296, at 3, 50, 142, 202; 7 PENNSYLVANIA DEBATES, *supra* note 313, at 239, 251–54.

315. 7 PENNSYLVANIA DEBATES, *supra* note 313, at 252 (comments of Mr. Corson) (“Now we have got it in the best possible shape to suit all parties”). Mr. Broomall, one of the most vocal opponents of the committee’s original language referring to God, was a Quaker. *See id.* The delegates frequently clashed during the convention over matters concerning religion, including the power of courts to grant divorces in cases of adultery, *see* 2 PENNSYLVANIA DEBATES, *supra* note 297, at 617–21; appropriations to churches, *see* 2 PENNSYLVANIA DEBATES, *supra* note 297, at 678–79; qualifications for witnesses in court, 1 PENNSYLVANIA DEBATES, *supra* note 295, at 801–02; and qualifications for office holders, 5 PENNSYLVANIA DEBATES, *supra* note 296, at 561–67; 7 PENNSYLVANIA DEBATES, *supra* note 313, at 253–55.

A “statement and exposition of the changes contained in the new Constitution of Pennsylvania” drafted to accompany the document sent for ratification explained the changes to the preamble in Type 1 language: “[t]he preamble is made to express the gratitude of the people of the Commonwealth to Almighty God for the blessings of civil and religious liberty” 2 JOURNAL OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1290 (1873).

ence (and ultimate failure) of the National Reform Association's efforts to adopt language – in the federal Constitution and in the constitutions of the states – recognizing the authority of God and the divinity of Jesus.³¹⁶ Indeed, it was the grass-roots supporters of that movement who sought to convince the Pennsylvania convention to adopt such language. The movement was aggressive at the federal level, convincing Congress to consider proposed “Christian Amendments” on at least four occasions between 1864 and 1910, though none passed.³¹⁷ The Association was also active at the state level, but there, too, it failed to convince any state conventions to adopt such language.

In one sense, the National Reform Movement represents an exaggerated version of the Second Great Awakening's missionary impulse. In this version, the idea of community moral transformation is replaced with Christian triumphalism, in asserting the ultimate subordination of other faiths to the Protestant version of God's reign through Jesus Christ. But this idea does not flow inevitably from the Second Great Awakening, which also asserted the theological imperative of voluntary response to the religious call. For some, and perhaps many, whose beliefs derived from the Second Great Awakening, the explicit Christian references proposed by the National Reform Movement were uncomfortably similar to the state-imposed belief that they had rejected.

If nothing else, the National Reform Movement, in advocating more explicit and robust theological claims, shifted the question from *whether* a preamble should refer to God to *how* a preamble should do so. Accordingly, the language that the 1873 Pennsylvania convention chose for the preamble – which goes beyond many states' references, by contemplating a continuing role for God in human affairs – in fact was something of a modest victory for those who wanted no reference to God at all, and who certainly did not want their constitution to contain a declaration of the Christian God's sovereignty on earth.

In all, between 1861 and 1877, twenty different states collectively adopted forty-one constitutions. Twenty-seven of the forty-one constitutions mentioned God in the preamble, and sixteen of the twenty states adopted at least one constitution during this era that included a

316. GREEN, THE SECOND DISESTABLISHMENT, *supra* note 68 at 334–41; Jim Allison, *The NRA (National Reform Association) and the Christian Amendment*, NAT'L REFORM ASS'N, <http://candst.tripod.com/nra.htm> [<https://perma.cc/GR9N-PKRE>] (last visited Apr. 24, 2017).

317. *Id.*

reference to God. Because of the southern states' gradual embrace of the practice of referring to God, eight of the fourteen constitutions adopted during this era that did not refer to God were adopted before the end of the Civil War. Accordingly, the trend in favor of references to God accelerated in the second part of this era. In addition, no state that previously had adopted a constitution referring to God dropped such a reference during this era. By the end of Reconstruction, thirty states overall had references to God in the preambles to their constitutions; only eight states did not have any reference to God in their preambles in 1877.³¹⁸

E. 1878–Present

From 1878 to the present, thirty-three states collectively adopted forty-two constitutions. Of those forty-two, all but one referred to God in the preambles. It is clear that, by this era, most states simply borrowed preamble language from other states, rather than seeking to craft new language to reflect any distinctive set of political or theological commitments. Accordingly, the choice between Type 1 and Type 2 language ceased to have much significance.³¹⁹ Indeed, state constitutional conventions rarely engaged in the types of debates over preamble language that characterized the era between 1840 and 1877. But the practice of referring to God in the preamble clearly was the norm. All twelve states admitted to the union during this era adopted references to God in their original constitutions. In addition, three states that had previously adopted constitutions without references to God (Kentucky, Michigan, and West Virginia) adopted new constitutions or amendments during this era with preambles mentioning God.

Between 1878 and 1900, fifteen states collectively adopted sixteen constitutions.³²⁰ All sixteen referred to God in their preambles. From 1901 to the present, twenty states collectively adopted twenty-six constitutions.³²¹ All but one referred to God. (Virginia, which referred to God for the first time in its 1902 constitution, omitted the preamble when it adopted its most recent constitution, in 1971.)

318. Virginia, which had a reference to God in the preamble to its 1870 constitution (and its 1902 constitution) later abandoned the reference, in its 1971 constitution.

319. We note, however, that of the forty-one preambles referring to God adopted in this era, twenty-four used Type 1 language and seventeen used type 2 language.

320. Louisiana adopted two constitutions during this era (one in 1879 and one in 1898).

321. Louisiana adopted three constitutions during this era; Michigan adopted two; Georgia adopted three; and Virginia adopted two (the first with a reference to God, and the second with no such reference).

Most of the preambles adopted after 1900 used one of the common verbal formulations in referring to God. There were only a few meaningful variations. Montana's current preamble, adopted in 1973, expresses gratitude to God for "the quiet beauty of our state, the grandeur of our mountains, [and] the vastness of our rolling plains."³²² Hawaii's preamble, adopted upon admission in 1959, expresses gratitude "for Divine Guidance" but also notes the state's "heritage and uniqueness as an island State."³²³

Although the National Reform Movement, and Protestant fundamentalism more generally, had lost much of its popular support by the third decade of the twentieth century, religious conservatism rebounded significantly in the 1950s. The reasons for this revival are varied and complex, but it can be explained at least in part by concerns about communist atheism, the emergence of secular humanism in the West, and the increasing engagement of the federal courts.³²⁴

In 1960, as litigation over prayer and bible reading in schools was making its way to the Supreme Court, West Virginia (for the first time) adopted a preamble to its constitution, as an amendment in a referendum submitted to the voters. The preamble, which is still part of the state's constitution, is perhaps the most avowedly religious of all of the states' preambles. It does not merely express gratitude to God for liberty, nor even (as do other Type 2 preambles) simply invoke God's guidance, blessing, direction, or favor. Instead, it declares that the people enjoy that liberty "through Divine Providence," implying that the people's continued enjoyment of liberty is contingent on the sufferance of God.³²⁵ In addition, the preamble "reaffirm[s]" the people's collective "faith in and constant reliance upon God," thereby suggest-

322. We considered this a Type 1 preamble because it envisions God as creator yet makes no other explicit claim of continuing divine involvement in human affairs.

323. HAW. CONST. pmb1.

We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, 'Ua mau ke ea o ka aina i ka pono.' We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire. We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.

Id. We considered this a Type 2 preamble because of its reference to God's "guidance."

324. See MCLOUGHLIN, *supra* note 122, at 179-216.

325. W. VA. CONST. of 1960, pmb1.

ing that the state is a worshipping body.³²⁶ The journal of the state legislature, which adopted the language of the preamble and forwarded it to the voters in a referendum, does not reflect any debate about the language, and the voters approved the measure in a lopsided vote.³²⁷ It is difficult not to see the decision, however, as the product of religious conservatism's revival in this era.

IV. THE PREAMBLES RECONSIDERED

The story of the state preambles is far deeper and richer than the mere fact that forty-five of the current fifty state preambles refer to God. As we have demonstrated, the history of references to God in state constitutional preambles reveals the significant influence of the Second Great Awakening in shaping understandings of the relationship between religion and civil government. At the time of the founding, such references were far from the norm, but they became so only because of the Second Great Awakening's spread through the North and Midwest. Indeed, the preambles provide especially strong evidence of the rapid spread of the movement's influence. Relatedly, they highlight the extent to which differences between the South and other parts of the country extended not only to politics and racial policy, but also to matters of religion. These observations suggest the need for much more careful study of the effects of the Second Great Awakening on other aspects of the relationship between religion and government, which until now has been generally neglected in the legal academy.³²⁸

The rich history of the preambles also underscores the complexity of using them as the basis for any strong normative claims about the proper relationship between religion and civil government. In modern debates over the constitutionality of official acknowledgment of God, proponents of the view that such actions are constitutionally permissible regularly advance originalist arguments, relying on history and a

326. The preamble provides: "Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of West Virginia, in and through the provisions of this Constitution, reaffirm our faith in and constant reliance upon God and seek diligently to promote, preserve and perpetuate good government in the State of West Virginia for the common welfare, freedom and security of ourselves and our posterity." W. VA. CONST. of 1960, pmbl.

327. The popular vote in favor of the amendment was 250,984 to 102,340. See W. VA. CONST. of 1960, pmbl. note.

328. For the few notable exceptions, see GREEN, *THE SECOND DISESTABLISHMENT*, *supra* note 68, at 91; GORDON, *supra* note 132, at 19.

long tradition of such actions. Specifically, those sympathetic to this approach have measured constitutionality under the Establishment Clause by seeking to determine whether a particular practice “was accepted by the Framers and has withstood the critical scrutiny of time and political change”³²⁹ and thus is the product of an “unambiguous and unbroken history of more than 200 years.”³³⁰

Our discussion of the evolution and development of the preambles to the state constitutions makes clear, however, that there is no unbroken tradition, dating to the framing, of acknowledgments of God in the states’ constitutions. As explained above, at the time of the framing of the federal Constitution, such references were anomalous. The states that adopted preambles with such references remained outliers for the first half-century after the ratification of the Constitution. (Indeed, several of the states whose preambles referred to God in the first several decades after ratification of the federal Constitution also had established churches for part of that period, even though that practice became increasingly atypical.) The practice of acknowledging God in state preambles did not begin to become the norm until the 1840s, when the influence of the Second Great Awakening finally reached state constitutional conventions across the North and the Midwest. In other words, an approach that views founding-era history as determinative should not treat the preambles as clear evidence of constitutional meaning.³³¹

Originalists might also contend – and, indeed, some have – that the preambles are evidence that other types of official acknowledgements

329. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014); *see also* *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that practice of state legislature to open sessions with prayer did not violate Establishment Clause).

330. *Marsh*, 463 U.S. at 792.

331. There is a plausible originalist claim that state preambles demonstrate that the anti-establishment norm – assuming it is incorporated against the states, *but see* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring in judgment) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments” and thus “it makes little sense to incorporate the Establishment Clause.”) – is more flexible as applied to the states than it is to the federal government. The argument would note that, whatever the status of acknowledgments of God at the time of the ratification of the First Amendment, was an entrenched practice by 1868, when the Fourteenth Amendment was ratified. But such a view would be inconsistent with well-settled modern doctrine on incorporation, which holds that “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’” *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)).

of God are permissible.³³² The more modest versions of these arguments claim that public invocations of “God” or “the Almighty” are consistent with our traditions.³³³ The more robust versions of these arguments claim that reverential acknowledgment of the monotheistic God of the Judeo-Christian tradition is acceptable.³³⁴ These arguments typically point to practices that date to the founding, such as the appointment of legislative and military chaplains and the issuance of Thanksgiving proclamations.³³⁵ These arguments are subject to at least two significant objections. First, there are important differences between constitutional preambles that refer to God and these other practices. For example, legislative and military chaplains facilitate the private religious exercise of those whom they serve. Neither form of chaplaincy indicates a claim that the government itself constitutes a holy community. Thanksgiving proclamations may represent a closer case, but they are ephemeral in character, unlike language that becomes entrenched in a constitutional preamble.

Second, those who have made historical claims about the place of religion in government have often relied as much on sources from the time of the Second Great Awakening as they have on those that date to the founding era. This is unsurprising, because by the 1830s one of the core projects of the Second Great Awakening was to re-imagine the framers as devout Christians and the framing as a divinely guided and blessed effort to create a holy community of believers.³³⁶ Put more starkly, leaders and writers in the Second Great Awakening endeavored to remake the founders in their own image. Notwithstanding the important differences between the religious views of the framing era and those of the Second Great Awakening, leaders of the movement and scholars of the later era sought to recast the framers as men committed to promoting a public role for religion—and Protestant values in particular—as a means of transforming the community. They also sought to recast the framing as an effort to recognize the United States as God’s chosen community.

332. See *supra* note 4 and accompanying text.

333. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“[N]othing in the Establishment Clause requires government to be strictly neutral between religion and irreligion . . .”).

334. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 885, 893–84 (2005) (Scalia, J., dissenting).

335. See *Wallace*, 472 U.S. at 100–05 (Rehnquist, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 633–36 (1992) (Scalia, J., dissenting).

336. See MCKENNA, *supra* note 52, at 131.

For example, in his 1833 Commentaries on the Constitution of the United States, Justice Story advanced a view of the original understanding of the Establishment Clause that tolerates official state support not only of religion generally, but also of Christianity specifically. He declared,

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.³³⁷

On his account, “[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.”³³⁸

Justice Story was clearly influenced by the theological understandings of the Second Great Awakening. In introducing the topic of the First Amendment’s religion clauses, he stated:

The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues;—these never can be a matter of indifference in any well ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them. And at all events, it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects.³³⁹

His view of the Establishment Clause followed naturally from this understanding: “Now, there will probably be found few persons in this, or any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed

337. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868, at 726 (1833).

338. *Id.*

339. *Id.* § 1865, at 722–23.

truth.”³⁴⁰

Leading figures in the 1830s also pressed the view that the framing of the country and the Constitution were efforts to create a holy community, in a land chosen by God. John Quincy Adams, for example, declared:

Is it not that, in the chain of human events, the birthday of the nation is indissolubly linked with the birth-day of the Saviour? That it forms a leading event in the progress of the gospel dispensation? Is it not that the Declaration of Independence first organized the social compact on the foundation of the Redeemer's mission upon earth? That it laid the corner stone of human government upon the first precepts of Christianity, and gave to the world the first irrevocable pledge of the fulfillment of the prophecies, announced directly from Heaven at the birth of the Saviour and predicted by the greatest of the Hebrew prophets six hundred years before?³⁴¹

He reprised this theme two years later in a speech commemorating the fiftieth anniversary of the inauguration of George Washington as President, telling his fellow citizens that “the ark of *your* covenant is the Declaration of Independence. Your Mount Eba [is] the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States.”³⁴² He urged Americans to “[I]ay up these principles, [] in your hearts, and in your souls . . . teach them to your children, . . . write them upon the doorplates of your houses, and upon your gates . . . [and] adhere to them as to the cords of your eternal salvation[,]” so that for years after they could celebrate “all the blessings promised to the children of Israel upon Mount Gerizim, as the reward of obedience to the law of God.”³⁴³

But this project to cast the framers as committed to the foundation of a Christian community clearly was ahistorical. First, the idea that the entire American society was the proper object of religious transformation would have conflicted with the understanding common at the time of the framing that religion belongs to the individual, whose

340. *Id.* § 1867, at 724.

341. JOHN QUINCY ADAMS, AN ORATION DELIVERED BEFORE THE INHABITANTS OF THE TOWN OF NEWBURYPORT, AT THEIR REQUEST, ON THE SIXTY-FIRST ANNIVERSARY OF THE DECLARATION OF INDEPENDENCE 5-6 (1837).

342. JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION 119-120 (1789) (emphasis in original).

343. *Id.* at 119-20.

connection to God derives from a personal experience of rebirth in the Spirit. To be sure, at the time of the framing, some New England Congregationalists and other orthodox Calvinists retained Puritan views about the centrality of religious community. But those views represented only one end of the theological spectrum and were geographically concentrated in New England. The view that the entire community was a proper object of transformation was inconsistent with the framing-era views of Unitarians and Deists—including many of the most prominent framers, such as James Madison and Thomas Jefferson—who generally rejected Christian understandings of God and the idea that God plays an ongoing role in the direction of human affairs.³⁴⁴ Equally important, it was inconsistent with the fundamental claim of that era's Protestant evangelicalism, which focused on the salvation of the individual and the personal moral change that flowed from that salvation.

Second, the Second Great Awakening's vision of the United States as God's chosen place for the restoration of Christianity would have clashed with a widely held concern at the framing about giving political power to religious institutions.³⁴⁵ Indeed, perceptions of wide abuse of the monopoly power of the Church of England undoubtedly formed the key backdrop to the adoption of the Constitution's Establishment Clause.³⁴⁶ We recognize that some at the time of the framing

344. See, e.g., Letter from Thomas Jefferson to Miles King (September 26, 1814), in 7 THE PAPERS OF THOMAS JEFFERSON 198 (J. Jefferson Looney ed., Princeton Univ. Press 2010) (“[O]ur particular principles of religion are a subject of accountability to our god alone. I enquire after no man’s, and trouble none with mine: nor is it given to us in this life to know whether your’s or mine, our friend’s or our foe’s are exactly the right.”);

When we shall have done away the incomprehensible jargon of the Trinitarian arithmetic, that three are one, and one is three; when we shall have knocked down the artificial scaffolding, reared to mask from view the simple structure of Jesus, when, in short, we shall have unlearned every thing which has been taught since his day, and got back to the pure and simple doctrines he inculcated, we shall then be truly and worthily his disciples

Letter from Thomas Jefferson to Timothy Pickering (February 27, 1821), in JEFFERSON’S EXTRACTS FROM THE GOSPELS: “THE PHILOSOPHY OF JESUS” AND “THE LIFE AND MORALS OF JESUS” 403 (Dickinson W. Adams & Ruth W. Lester eds., Princeton Univ. Press 1983).

345. See, e.g., THOMAS PAINE, THE AGE OF REASON 6 (1827) (“My own mind is my own church. All national institutions of churches whether Jewish, Christian or Turkish, appear to me no other than human inventions, set up to terrify and enslave mankind, and monopolize power and profit.”).

346. Letter from Thomas Jefferson to Alexander von Humboldt (December 6, 1813), in 7 THE PAPERS OF THOMAS JEFFERSON 29 (J. Jefferson Looney ed., Princeton Univ. Press 2010) (“[H]istory, I believe furnishes no example of a priest-ridden people maintaining a free civil

conceived of the newly born nation in millennial terms, calling it the “New Jerusalem,” but they constituted only a small minority, both in the population and among the framers.³⁴⁷ Similarly, we recognize that it was common at the time to attribute successes (military or legislative) to Divine Providence. But such attribution rarely invoked the full structure of Puritan beliefs in God’s chosen land, and instead reflected a personal sense of thanksgiving for good fortune.

As we have explained, the Second Great Awakening sought to impose on the founding its later understanding of the relationship between religion and the political community. In the second half of the twentieth century, a new evangelical movement revived those same claims about the founding. At a time of conflict over prayer in schools, the funding of religious education, and moral issues closely tied to faith, evangelicals began to reassert the idea that America was founded as a Christian nation, and had simply lost its way. On this view, modern changes in law, politics, and society represented a dramatic departure from an otherwise unbroken tradition, dating to the Revolutionary generation, that contemplated a particular relationship between Protestant Christianity and civil government.

Crucially, in pressing these claims, twentieth-century evangelicals often relied on ideas that were either generated or widely spread by the Second Great Awakening.³⁴⁸ But because those claims made about the founding during the Second Great Awakening were ahistorical, later claims resting on them were similarly flawed. In their essence, late-twentieth-century evangelical claims about the founding viewed the framing through the Second Great Awakening’s already distorted lens.³⁴⁹

This move found its first legal foothold in Justice Rehnquist’s 1985 dissent in *Wallace v. Jaffree*,³⁵⁰ in which he asserted that “nothing in the Establishment Clause requires government to be strictly neutral be-

government. [T]his marks the lowest grade of ignorance, of which their civil as well as religious leaders will always avail themselves for their own purposes.”)

347. See Wythe Holt, *The New Jerusalem: Herman Husband’s Egalitarian Alternative to the United States Constitution*, in *Revolutionary Founders: Rebels, Radicals, and Reformers in the Making of the Nation* (Alfred F. Young, Gary B. Nash, & Ray Raphael, eds. 2010; HUTSON, *supra* note 51, at 113–14).

348. See STEVEN K. GREEN, *INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING* 201 (2015) [hereinafter GREEN, *INVENTING A CHRISTIAN AMERICA*]; NOLL ET AL., *supra* note 347, at 15–21.

349. See GREEN, *INVENTING A CHRISTIAN AMERICA*, *supra* note 348, at 201; NOLL ET AL., *supra* note 347, at 21–22.

350. 472 U.S. 38 (1985).

tween religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.”³⁵¹ Rehnquist’s opinion asserted that the “true meaning of the Establishment Clause can only be seen in its history,” and purported to describe the framers’ “intentions” in adopting that provision.³⁵² Justice Rehnquist relied in part on the drafting history of the First Amendment. But he also put significant weight on the views expressed in Joseph Story’s *Commentaries*,³⁵³ which, as we explained above, reflects the theological understandings of the Second Great Awakening more than it reflects any consensus view from the time of the framing. Indeed, he relied on Story’s views—and those of Thomas Cooley, who wrote his treatise several decades later, at a time when the “Protestant Establishment” had permeated legal as well as political thought³⁵⁴—to demonstrate that “the Establishment Clause of the First Amendment had acquired a well-accepted meaning” prohibiting only a “preference among religious sects or denominations.”³⁵⁵ Rehnquist’s non-preferentialism followed neatly from the understandings of the Second Great Awakening, which emphasized a broadly Christian culture rather than the specific doctrines of any particular denomination. But those understandings do not follow inevitably from views commonly held at the time of the framing.

Rehnquist’s vision of Establishment Clause history, with its heavy reliance on the ideas from Second Great Awakening, reappears in Justice Scalia’s dissents in cases involving prayer at public school events³⁵⁶ and the display of the Ten Commandments.³⁵⁷ Indeed, Justice Scalia deployed this history to advance an even more robust vision of religion’s place in the civil order; in his view, this history meant that government may constitutionally acknowledge with reverence the God of

351. *Id.* at 113.

352. *Id.*

353. *Id.* at 104–05.

354. See GORDON, *supra* note 132, at 19–20, 66, 138; GREEN, THE SECOND DISESTABLISHMENT, *supra* note 68, at 190–99, 360–63; MCKENNA, *supra* note 52, at 130–32.

355. *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

356. See *Lee v. Weisman*, 505 U.S. 577, 632, 646 (1992) (Scalia, J., dissenting) (relying on a “longstanding American tradition of nonsectarian prayer to God at public celebrations generally” and asserting that the “Founders of our Republic . . . knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek”).

357. *McCreary County v. ACLU*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting).

the Judeo-Christian tradition.³⁵⁸ But Justice Scalia invoked the legacy of the Second Great Awakening, and not the founding, when he asserted that “[r]eligious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the ‘protection of divine Providence,’ . . . not just for individuals but for societies.”³⁵⁹

Although the preambles thus do not provide significant support for originalist claims about the proper relationship between religion and government, those who accept the possibility of dynamic constitutional meaning must grapple with the significance of the pervasive references to God in the state preambles. After all, if post-ratification cultural and legal changes can become the basis for evolving constitutional meaning, then there is a plausible argument that the preambles represent just such a change in understandings about the appropriate relationship between religion and the political order. On this view, the preambles—and the understandings of the Second Great Awakening—are simply part of our inheritance, which helps to determine constitutional meaning today.

That said, the possibility of evolved meaning does not dictate the specific outlines of the relationship between religion and government. For some, the overwhelming frequency of references to God in state preambles might suggest that there ought to be fewer limits on the relationship between religion and the state. On this view, an embrace of the understandings of the Second Great Awakening would justify official acknowledgment of God and greater involvement by religious institutions in the provision of government services, a conclusion that flows naturally from the movement’s belief in the importance of religion in both personal and communal transformation.³⁶⁰

For others, the preambles are consistent with the view that the Es-

358. *Id.* at 893–94 (asserting that “[h]istorical practices [] demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion,” in part because the “three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic”).

359. *Weisman*, 505 U.S. at 645 (Scalia, J., dissenting).

360. For example, the Bush Administration’s faith-based initiative, which authorized government aid for religious social-service providers, proceeded in large part from the premise that transformative religious experiences can lead to personal moral growth, which then transforms the whole community. This premise derives from core understandings of the Second Great Awakening.

establishment Clause contemplates a firmer separation between religion and government. On this view, with which we are sympathetic, the preambles merely reflect the fact that a large percentage of the American people have long maintained a strong religious identity. In addition to a normative commitment to some degree of church-state separation, this approach rests upon a basic understanding of the functions and limitations of constitutional preambles. Preambles are statements of the people's aspiration and inspiration, rather than sources of government's authority. Put more simply, preambles do not have legal effect. This status reflects the important distinction between the voice of a religious people, on the one hand, and the legal authority of a secular government, on the other.³⁶¹

On this view of a constitutional preamble's function, the state preambles do not necessarily support a more robust relationship between religion and government. Of course, if the people of Tennessee or Oregon today adopted a preamble that expressed gratitude to God, we would be hard pressed to argue that the act violates the Establishment Clause. The long-standing tradition of such references, even though it does not date to the founding, effectively renders the practice permissible. But one need not extend that approval to other forms of governmental acknowledgment of God. In other contexts, such religious expression risks entangling government officials in religious institutions or marginalizing those who do not share the beliefs expressed by the government.

At a minimum, the preambles imply nothing about the permissibility of government aid to religious institutions, or the extent to which those institutions may express their religious identity through proselytizing while receiving government funds. The constitutionality of these practices cannot be resolved simply by noting that most of the state preambles refer to God. Instead, the preambles simply reinforce a widely known, albeit slowly changing, fact about that the American polity – that, statistically speaking, it is deeply religious.

V. CONCLUSION

State constitutions generally have been neglected in contemporary legal scholarship.³⁶² Accordingly, many legal scholars likely will be

361. See IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 3–4 (2014).

362. For some exceptions, see JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 1–18 (2005); G. ALAN

surprised to learn that the vast majority of state constitutions expressly refer to God in their preambles. As we have demonstrated, the story of the preambles is considerably richer than this mere statistic. Through the evangelical energy of the Second Great Awakening—yet another phenomenon understudied by the legal academy—preambles referring to God spread from the Northeast to the Midwest and, eventually, to the South.

The gradual development of this practice complicates both originalist claims for the permissibility of official acknowledgments of religion and non-originalist claims opposing them. At bottom, however, we think that this dispute is best resolved by considering the character and function of constitutional preambles. As the voice of the people, rather than an exercise of governmental authority, a preamble is a statement of inspiration and aspiration. Viewed this way, religious language in a preamble, however common the practice, teaches us very little about the appropriate scope of government power to support or endorse religion.

TARR, UNDERSTANDING STATE CONSTITUTIONS 1–27 (1998); Erwin Chemerinksy, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1697, 1709 (2010).

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